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Supreme Court, U.S.
FILED

03 598 OCT 21 2003

No. 03-

In The
Supreme Court of the United States

STATE OF NEW JERSEY,

Petitioner,

v.

ANDERSON GARRON,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

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PETITION FOR WRIT OF CERTIORARI

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October 21, 2003

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223 pp

QUESTION PRESENTED FOR REVIEW

Whether the balancing test set forth in New Jersey's Rape Shield Statute, N.J.Stat.Ann. 2C:14-7, is facially violative of the Sixth Amendment by requiring that evidence of a victim's past sexual conduct be "relevant and highly material," and that its probative value "substantially outweigh" its collateral nature, capacity for prejudice, confusion of issues or an unwarranted invasion of the victim's privacy, before it may be introduced at trial.

PARTIES BELOW

All parties below are parties to this petition.

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

The petitioner, State of New Jersey, respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the Supreme Court of New Jersey entered in the above-entitled proceeding on July 23, 2003.

OPINIONS BELOW

The opinion of the Supreme Court of New Jersey is reported at 177 N.J. 147, 827 A.2d 243 (2003), and is reprinted in the Appendix at 1a to 54a.

The unreported opinion of the Superior Court of New Jersey, Appellate Division, is reprinted in the Appendix at 55a to 114a.

The unreported opinion of the Superior Court of New Jersey, Law Division, is reprinted in the Appendix at 115a to 121a.

JURISDICTION

The jurisdiction of this Court to review the judgment and opinion of the Supreme Court of New Jersey, dated July 23, 2003, is invoked under 28 U.S.C. § 1257(a).

The portion of the opinion of the Supreme Court of New Jersey to which *certiorari* is sought is based on that court's interpretation of this Court's Sixth Amendment jurisprudence. The New Jersey court briefly cites New Jersey's state constitutional analog and its own precedent in this area. 177 N.J. at 168-69, 171, 827 A.2d at 255-56. 19a to 23a. But its doing so does not amount to a "clear and express" statement that its holding is based on a "bona fide separate, adequate and independent [state] ground" under *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) -- just as it did not under virtually identical circumstances in *Florida v. Riley*, 488 U.S. 445, 447 n.1 (1989). That is especially so as the cited precedent,

State v. Budis, 125 N.J. 519, 593 A.2d 784 (1991), relied exclusively on this Court's decisions in reaching its conclusions, *Budis*, 125 N.J. at 531-32, 593 A.2d at 789-90, just as in *Pennsylvania v. Labron*, 518 U.S. 938, 940-41 (1996), and *Michigan v. Chesternut*, 486 U.S. 567, 570 n.3 (1988), where jurisdiction was found. Thus, the state cites are not a "plain statement" sufficient to advise that the federal cases are only used for "guidance," particularly where the decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law" and "the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Michigan v. Long*, 463 U.S. at 1040-41.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

N.J.Stat.Ann. 2C:14-7

N.J.Stat.Ann. 2C:14-7, New Jersey's Rape Shield Statute, is set forth in the appendix at 122a to 123a.

STATEMENT OF THE CASE

Although the constitutionality of New Jersey's Rape Shield Statute was itself never contested by respondent below, the Supreme Court of New Jersey declared its statutorily-prescribed balancing test facially unconstitutional on a *sua sponte* basis. It then reformulated that test, applied it to this case, and reversed respondent's sexual assault and official misconduct convictions for crimes committed while he was an on-duty police officer.

This case involves an incident that took place in the early morning of September 28, 1998. While the State's evidence was of a sexual assault, respondent claimed that the encounter was consensual. Respondent and the victim, J.S., were acquaintances by virtue of J.S. having worked for several years at the Cumberland County Prosecutor's Office in Bridgeton, New Jersey, where respondent's wife, Stephanie, was a detective. Respondent frequently visited his wife there and developed a friendly relationship with J.S., who was a friend of Stephanie. 60a.

At 3:30 in the morning in question, respondent drove out of his patrol area in Bridgeton and pulled into J.S.'s driveway, ostensibly to investigate an illuminated light in her car. J.S. was upstairs dressing for work, preparing for her 4:30 a.m. shift at a state prison. After respondent and J.S. examined the car and saw nothing amiss, respondent followed J.S. into the rear laundry room of her home and asked for a "hug for this." Hoping he would leave, J.S. complied. Respondent, however, wrapped his arms around J.S. and tried to kiss and otherwise force himself on her, pushing her to her knees and unzipping his pants as she resisted and begged him to stop because she knew his wife. Ignoring her pleas and repeatedly forcing her back to her knees, respondent ultimately drew his service revolver. He then activated its laser sight, and set it on a dresser next to him, keeping the sight illuminated. When he did so, J.S. became

fearful for her life and relented. Respondent thus forced J.S. to perform fellatio upon him, ending with his ejaculating in her mouth. J.S. then spat the ejaculate into a nearby wash cloth. As he pulled up his pants at the conclusion of the incident, respondent stated, "this is going to be our secret, right?" He left at approximately 3:45 a.m. 60a to 62a.

After respondent left, J.S. rinsed her mouth with rubbing alcohol. She then finished getting dressed and left for work. She later confided to a friend that she had been raped and ultimately had to leave work after breaking down emotionally. Although J.S. told her friend that she was afraid to report the rape because she knew respondent and his family and was fearful given his status as a police officer, she overcame her fear and reported the incident later that evening. 62a to 63a.

Respondent testified at trial and claimed that it was J.S. who initiated the sexual encounter. To support his theory, respondent testified that J.S. had touched his buttocks while he was visiting his wife at the Prosecutor's Office some two to three years earlier. He also testified that J.S. kissed him passionately when she left the prosecutor's office approximately 18 months before the assault, and again when he assisted her with paying a fine two months before the incident. Respondent's wife, Stephanie, corroborated the rear-end touching and also provided testimony regarding the kiss on J.S.'s last day at the prosecutor's office. 64a to 65a.

Respondent was convicted of first degree aggravated sexual assault, N.J.Stat.Ann. 2C:14-2a(4); third degree aggravated sexual contact, N.J.Stat.Ann. 2C:14-3a, and second degree official misconduct, N.J.Stat.Ann. 2C:30-2a. 1a to 2a.

On appeal, respondent claimed that the trial court infringed on his right to confrontation and compulsory process by excluding additional aspects of his pre-trial proffer

regarding his prior relationship with J.S. At that "rape shield" hearing, held pursuant to N.J.Stat.Ann. 2C:14-7a, respondent had elicited testimony from three secretaries at the prosecutor's office, all of whom recounted a flirtatious relationship between J.S. and respondent. Respondent and his wife testified similarly. The witnesses described how over several years' worth of respondent's visits, J.S. would flirt with him as he stood talking with his wife -- touching his arms and chest, making suggestive comments and so on. Respondent's wife, however, acknowledged that she took this all in "a light-hearted way." Thus, while the trial judge permitted respondent to introduce the rear-end touching incident and the two alleged kisses, he excluded the flirtation evidence because that conduct was "taken lightly by the parties" and "was not probative of whether a reasonable person would have believed that J.S. freely and affirmatively consented to the sexual conduct on September 28, 1998." That ruling was affirmed on appeal, with one judge dissenting. 76a to 84a; 95a to 105a.

Respondent appealed as of right to the Supreme Court of New Jersey on the basis of the dissent in the Appellate Division, *N.J.Court Rules, 1969*, R. 2:2-1(a)(2). The Supreme Court of New Jersey addressed the issues by first noting a 1994 legislative amendment to the Rape Shield Statute that adjusted the analytical framework -- an amendment the Court deemed invalid on its face. That amendment calls for exclusion of evidence regarding a rape victim's past sexual conduct unless it is "relevant and highly material" and also that its probative value "substantially outweighs" its collateral nature, confusion of issues or an unwarranted invasion of the victim's privacy. N.J.Stat.Ann. 2C:14-7a. 122a. The earlier version of the statute merely required that the evidence be "relevant" and that its probative value "not [be] outweighed by" its collateral nature, etc. 177 N.J. at 167-68, 827 A.2d at 255. 17a to 19a.

The Court opined that the amended version of the statute did not pass muster because it "would keep from the jury evidence that is admissible under the Confrontation and Compulsory Process Clauses . . ." The Court held that it "must construe the Statute so that its reach does not exceed its constitutional limits." 177 N.J. at 172, 827 A.2d at 258. 23a. Thus, the Court altered the balancing test from what the statute dictated to one where the evidence must be merely "relevant" and its probative value "outweigh" its prejudicial effect to mandate admission at trial. Thus, the Court returned the balancing test to the *status quo ante*, as it was before the 1994 amendment. 177 N.J. at 172-73, 827 A.2d at 258. 23a to 24a.

REASONS FOR GRANTING THE WRIT

The State Court's Ruling That New Jersey's Rape Shield Statute Is Facially Invalid Under The Confrontation And Compulsory Process Clauses Conflicts With This Court's Jurisprudence On A Substantial Matter Of Federal Constitutional Law.

This case is emblematic of a national phenomenon demanding the global action only this Court can take. Time and again, we have seen a weakening of state rape shield laws due to hypervigilance for defendants rights at the expense of perfectly legitimate -- and constitutional -- reforms intended to encourage rape victims to finally entrust the criminal justice system instead of shunning it in frightened silence. Those reforms will never fully take root so long as state courts over-extend constitutional protections beyond recognition, as occurred in this case, thereby frustrating even modest steps toward demonstrably needed change.

In a decision that ignores all limitations to Sixth Amendment analysis, the Supreme Court of New Jersey has struck an aspect of the state's rape shield statute, deeming it invalid on its face. Just how extreme that ruling is can best be gauged by contrasting it against typical Sixth Amendment scenarios. This is not, after all, a blanket rule of exclusion for an entire category of evidence. Nor is it a case of "mechanistic" rule application, with no regard for a defendant's interests. Rather, the Supreme Court of New Jersey has gone so far as to declare a balancing test for the admissibility of evidence, of all things, to be incompatible by its very terms with the Sixth Amendment. Ironically, that test is designed to accommodate Sixth Amendment interests and indeed requires that they be taken into account in every case. What is more, the same test is found in the Federal Rules of Evidence as well as evidence rules of many states. Never before has it been viewed as innately incompatible with the

Constitution when applied to restrict a defendant's ability to cross-examine witnesses.

This petition for *certiorari* provides this Court with an opportunity to restore legislative power to its rightful extent. The ruling below addresses an important federal question, but resolves it in a way that conflicts with this Court's decisional law. Never before has this Court deemed a balancing test facially unconstitutional under the Sixth Amendment. And this test surely does not become so simply by presuming that the evidence at issue (of a rape victim's past sexual conduct) is inadmissible. Legislatively engrafting that test onto the Rape Shield Statute so as to limit the court's discretion was plainly a rational response to a loss in confidence among rape victims toward the criminal justice system, most specifically due to the manner in which courts had exercised discretion to admit evidence of victim's past sexual conduct. Unfortunately, the New Jersey Supreme Court stripped the very provision that legislative judgment deemed to be a measured way to hem that discretion while simultaneously preserving a judge's ability to factor in Sixth Amendment interests. Worse yet, the ruling artificially -- and forever -- restricts the Legislature's ability to address a grave criminal justice problem in the manner most directly related to the problem itself.

While the Sixth Amendment guarantees criminal defendants the right to confront their accusers and cross examine witnesses, is axiomatic that a defendant's right to present relevant evidence is not unlimited, but may be subjected to reasonable restrictions. *United States v. Scheffer*, 523 U.S. 303, 308 (1998); *Rock v. Arkansas*, 483 U.S. 44, 55 (1987); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). A defendant's interest in presenting relevant evidence may "'bow to accommodate other legitimate interests in the criminal trial process.'" *Scheffer*, 523 U.S. at 308 (quoting *Rock*, 483 U.S. at 55; *Chambers*, 410 U.S. at 295). That being so, "state and federal rulemakers have

broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *Scheffer*, 523 U.S. at 308.

In its ruling below, the New Jersey Supreme Court cites these maxims, but completely fails to acknowledge the analytical framework governing the issue at hand. That is, rules excluding relevant evidence do not abridge an accused's Sixth Amendment right to present a defense "so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Scheffer*, 523 U.S. at 308 (quoting *Rock*, 483 U.S. at 56). See also, *Montana v. Egelhoff*, 518 U.S. 37, 53 (1996) (it is "*the absence of any valid state justification*" that renders such rules of exclusion arbitrary, and thus, invalid) (emphasis in original), quoting *Crane v. Kentucky*, 476 U.S. 683, 690-01 (1986). That exclusion is "arbitrary" or "disproportionate" in constitutional terms "only where it has infringed upon a weighty interest of the accused." *Scheffer*, 523 U.S. at 308; *Chambers*, 410 U.S. at 302; *Washington v. Texas*, 388 U.S. 14, 22-23 (1967).

This deference to state rulemakers recognizes that the Constitution "does not permit the federal courts to engage in a finely-tuned review of the wisdom of state evidentiary rules." *Marshall v. Lonberger*, 459 U.S. 422, 438 n.6 (1983). That is because "the preventing and dealing with crime is much more the business of the States than it is of the Federal Government." *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996); *Patterson v. New York*, 432 U.S. 197, 201 (1977). Thus, the Court will "not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." *Ibid.*

Given this wide latitude traditionally afforded to state and federal rulemakers, it comes as no surprise that this Court has undone convictions based on exclusion of evidence in very limited circumstances; either when dealing with categorical rules of exclusion that were "manifestly unreasonable or

overbroad," *Ellsworth v. Warden*, 333 F.3d 1, 7 (1st Cir. 2003) (*en banc*), such that they arbitrarily excluded entire categories of evidence (see, e.g., *Washington v. Texas*, 388 U.S. 44 (1967); *Rock v. Arkansas*, 483 U.S. 44 (1987)); or court rulings that "mechanistically" applied evidence rules so as to completely foreclose a defendant's legitimate area of inquiry and thus undermine his ability to present a defense. See *Davis v. Alaska*, 415 U.S. 308 (1974); *Chambers v. Mississippi*, 410 U.S. 284 (1973). Those cases "involve egregious situations and the more recent decisions of the Court . . . create serious doubts that the Court is interested in carrying the doctrine beyond egregious cases." *DiBenedetto v. Hall*, 272 F.3d 1, 8 (1st Cir. 2001), cert. denied sub nom, *DiBenedetto v. Spencer*, 535 U.S. 1024 (2002).

In fact, those recent decisions have upheld even *per se* rules of exclusion that were not found arbitrary or disproportionate. *Scheffer*, 523 U.S. at 309 (*per se* exclusion of polygraph evidence); *Egelhoff*, 518 U.S. at 56 (total preclusion of evidence of voluntary intoxication permissible in murder prosecutions under Due Process Clause). *Scheffer* is particularly instructive of the degree of latitude afforded as it involved a *per se* rule of exclusion (for polygraph evidence) even though there was "no consensus" to support the notion that polygraph evidence was unreliable. 523 U.S. at 309. In upholding that rule in the face of such "extremely polarized" views, the Court held that "[w]e cannot say, . . . that presented with such widespread uncertainty, the President acted arbitrarily or disproportionately in promulgating a *per se* rule excluding all polygraph evidence." 523 U.S. at 312.

How much more latitude is due then, when the rule is not categorical but exactly the opposite. Given the broad freedom of movement that this Court's decisions afford even categorical rules, it should not be unexpected that no case supports the idea that a modest balancing test could possibly be facially invalid when, by definition, it prevents

"mechanistic" application and allows admitting the class of evidence at issue on a case-specific basis.

Indeed, in the very context of a rape shield statute, this Court held that total exclusion of relevant evidence, in some cases, "does not necessarily render the statute unconstitutional," given that the right to present it may bow to competing interests. *Michigan v. Lucas*, 500 U.S. 145, 149 (1991). As the Court observed, rape shield laws "represent[] a valid legislative determination that *rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy.*" *Id.* at 149-50 (emphasis added).

As for measured, non-categorical, limitations upon the presentation of evidence, such as the one struck down by the state court here, it is settled that there is "wide latitude . . . to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).

It is within that wide latitude that New Jersey's Legislature acted. The 1994 statutory amendment the New Jersey Supreme Court deemed facially invalid did no more than alter the Rape Shield Statute's balancing test so as to require exclusion of evidence regarding a rape victim's past sexual conduct unless the evidence is "relevant and highly material" and its probative value "substantially outweighs" its collateral nature, confusion of the issues, or an unwarranted invasion of the victim's privacy. N.J.S.A. 2C:14-7a. The earlier version of the statute merely required that the evidence be "relevant" and that its probative value "not [be] outweighed by" its collateral nature, etc.

Under Sixth Amendment jurisprudence, this legislative decision to modulate the balance and adopt an appropriately

more restrictive test concerning evidence of a rape victim's past conduct is neither arbitrary nor disproportionate to its purpose. Nor, as a matter of logic, could it on its face possibly infringe upon a weighty interest of the accused when it is, after all, designed to account for those very interests on a case-by-case basis.

Indeed, the 1994 amendment to New Jersey's Rape Shield Statute reflected, at bottom, a concern with the manner in which trial courts had been applying the statute. Its legislative history as well as the broader backdrop to its passage reveal a perceived need to channel discretion in admitting evidence of a rape victim's past sexual conduct so to make clear that such evidence was only to be admitted in the exceptional case. Judicial discretion was to be retained, but no broader than required by the Sixth Amendment.

That policy initiative grew out of a growing body of evidence from across the nation, and in New Jersey, demonstrating a crisis in confidence among sexual assault victims, largely fueled by the impression that existing rape shield statutes were being undermined by the manner in which trial courts were permitting what the statutes were clearly designed to prohibit. Strengthening the law had thus become a legislative imperative since weak rape shield laws were contributing to unacceptably low reporting rates of rapes by victims to police and, thus, undermining law enforcement itself.

As for evidence on national level, information from various sources demonstrated that rape victims had indeed remained distrustful of the criminal justice system. That in spite of rape shield statutes enacted in virtually every state as part of a broad rape-law reform movement some 15 to 20 years earlier. Those laws were designed to prevent foraging through rape victims' lives for the purpose of launching chastity-based credibility attacks. The laws were thus aimed at encouraging rape victims to come forward and report

attacks against them without fearing the system would put them, rather than the accused, on trial. The laws were also designed to enhance the reliability of the judicial process by eliminating the distorting effect on jury verdicts of prejudice against the "unchaste" (thus "less credible") complainant. See Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal For the Second Decade*, 70 Minn. L. Rev. 763, 791-801 (April, 1986).

Foremost were Congressional reports issued in the early 1990s, in conjunction with the Violence Against Women Act. *Senate Judiciary Committee Report No. 101-545* (October 19, 1990), for example, noted that despite legal reforms of the past 20 years concerning rape, "the promise of these changes has not always been realized." Among the noted shortcomings was the fact that despite rape shield laws, trial courts were still permitting what those laws were designed to prevent, and "*[v]ictims are still being asked irrelevant and harassing questions about their prior sexual history in assault and kidnapping cases.*" *Id.* at 33 (emphasis added). The effect of that unfulfilled reform was tangible. As the Judiciary Committee noted:

> Unfortunately, a disturbing aspect of gender crimes is how survivors often suffer from a sense of "double victimization" - victimization first by the attacker and, second, by society. More than one witness explained to the committee that "the system" is often an alien environment, contributing less to their assistance than to their sense of revictimization.
>
> As one witness put it: "[I]t never occurred to me to blame myself for my own attack; that is, until the courts, the press and society began to insinuate and to question if I were the architect of my own suffering." Another wrote: "if the system continues to badger and blame women for the crimes they

experience, it will not be [illegible] say, 'what's the point?'" *Id.* at 33-34.

The Judiciary Committee concluded that "there are ways to reduce [the] impact" of "double victimization," at least as far as the judicial process was concerned. Thus, among recommended reforms were "new rules . . . *to protect victims from irrelevant and embarrassing courtroom experiences.*" *Ibid* (emphasis added).

The Judiciary Committee added that "double victimization" would end only when lingering attitudes about violent crimes against women changed -- attitudes sustained in part with the imprimatur of courts that permit "[d]efense lawyers [to] pursu[e] questions about a victim's prior sexual history." *Ibid.* Accordingly, to strengthen rape shield laws that had not met expectations, the Judiciary Committee called for "*expanding existing evidentiary protections to insure that no crime victim will be subjected to harassing questions about her prior sexual history.*" *Id.* at 35 (emphasis added).

That is exactly what New Jersey sought to do a short time later with the legislative amendment at issue. But before New Jersey acted, more disturbing evidence surfaced regarding how widespread the problem of rape actually was across the nation, as well as equally dramatic statistics concerning underreporting of rapes to the police.

In an April 1992 study entitled *Rape in America, A Report to the Nation*, the Crime Victims Research and Treatment Center of the Medical University of South Carolina interviewed a nationally representative sample of 4008 women about sexual assault. Using a conservative definition of rape, that study nonetheless estimated that one of every eight adult women in America is forcibly raped during her lifetime. It

also found that 84% of rape victims do not report the incident to the police. *Id.* at 6.[1]

That dramatic underreporting carries serious consequences in terms of recidivism and public safety. Indeed, *Rape in America* cited a study of unincarcerated sex offenders in which 126 offenders admitted to a total of 907 rapes involving 882 different victims. The average number of different victims per rapist was seven. *Id.* at 6. Thus, *Rape in America* concluded: "the dire need for public safety dictates what America's public policy should be: to do everything possible to encourage reporting of *all* alleged rapes to police." *Ibid.* As far as what form that policy should take, the study asked rape victim service providers "what else can be done to increase victims' willingness to report sexual assaults to the police?" The agencies listed several measures, including "*better laws to protect victims in court.*" *Id.* at 11 (emphasis added).

These findings and conclusions were echoed elsewhere, even in this Court. See *Planned Parenthood v. Casey*, 505 U.S. 833, 890-91 (1992) (domestic violence studies show "[m]arital rape is rarely discussed with others or reported to law enforcement authorities, and of those reported only few are prosecuted"); Schafran, *Writing and Reading About Rape*, 66 St. John's L. Rev. at 1016 ("[a] significant percentage of victims fear that if they report the rape they will be humiliated and blamed by everyone in the criminal justice system . . . They have heard women who have gone through with reporting the crime and enduring a trial describe it as a

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[1] The Senate Judiciary Committee found an even lower reporting rate of 7%, compared with a 53% reporting rate for robberies. See Schafran, *Women in the Criminal Justice System: Writing and Reading About Rape: A Primer*, 66 St. John's L. Rev. 979, 1014 (1993) (citing Majority Staff of Senate Comm. on the Judiciary, 102d Cong., 1st Sess., Violence Against Women: The Increase of Rape in America 28 (Comm. Print 1991)).

second rape"); Torrey, *When Will We Be Believed? Rape Myths And The Idea Of A Fair Trial In Rape Prosecutions*, 24 U.C. Davis L. Rev. 1013, 1029-31 (1991) (empirical studies show that "most victims never report the crime of rape" because "women know . . . the experience of a trial is grueling and frequently provokes responses in the victim similar to those caused by the actual rape").

So, too, was the conclusion that judicial interpretation of rape shield statutes was frustrating the full measure of reform. See Simmons, *Michigan v. Lucas: Failing To Define The State Interest In Rape Shield Legislation*, 70 N.C. L. Rev. 1592, 1612-16 (1992) (noting that "many strict [rape shield] provisions have been judicially relaxed in an *ad hoc* manner," and that state courts have "fail[ed] to acknowledge state legislatures' intentions to limit drastically the admissibility of complainants' prior sexual history, opting instead to 'overprotect' the constitutional rights of defendants").

It was against that backdrop that concerns about rape shield efficacy crystalized in New Jersey, following the highly publicized "Glen Ridge trial" of 1992-93. See, *State v. Scherzer*, 301 N.J. Super. 363, 694 A.2d 196 (App. Div.), certif. denied, 151 N.J. 466, 700 A.2d 878 (1997). That sensational trial involved a gang rape by four high school athletes of a 17-year-old retarded girl with a baseball bat, a broom handle and a stick, and provided the impetus for the 1994 amendment. 134a to 135a. At the trial, the defense was allowed to introduce graphic evidence of the victim's sexual history.

In legislative hearings that followed, witnesses recounted what was permitted to occur in court:

> As taken from our daily notes and certain trial transcripts, the defense charged that the victim was -- and I want to stress to you that these are all quotes that I've pulled from those sources -- was a "full

> breasted, devious, sexually aggressive Lolita with a full knowledge of sex -- a long history before this incident -- who was ready, willing, able, and anxious to be assaulted -- who would do it again, who desired to perform these acts." "What did you do,["] [defense counsel] asked the victim's mother, ["]to protect the young males, in the event that they touched her?"
>
> Witnesses were asked about every detail of the victim's private life: Did she ever talk about boys, about sex? Did she swear, smoke, drink, or display any other immoral behavior? Couldn't it be that the victim initiated the perverse sexual assault because she was acting out against a strong mother figure? When did her breasts begin to develop? How large did they become? Boys were magnetized to her breasts, weren't they? And in typical "Did you ever hear that" or "Isn't it true that" form, defense counsel continually insinuated that the victim had engaged in numerous prior acts of "sexual misconduct." 135a to 136a.

That legislative witness recounted women across the state reacting with "shock," "disillusionment," and "anger" as "day after day, for nearly six months, the defense was allowed to put the victim on trial by resurrecting old myths and stereotypes about rape." 135a. She added, "[t]he Glen Ridge trial has shaken women's belief that rape victims will be treated fairly in New Jersey's courts. In short, the trial has created a crisis in confidence." 135a. She described it this way:

> During and after the trial, [another woman] and I spoke with hundreds of women in this State who were all asking the same question: If New Jersey's Rape Shield Law could not prevent "unchastity" based attacks on a young, vulnerable retarded

> victim, who had been gang raped with implements, how could it prevent such biased attacks on them? As a woman who called me seeking advice for her daughter who had been raped said, "How can we be sure she gets treated fairly? Look what's happened to that girl in Glen Ridge." And as another woman, someone I met in a local library said to me, "I thought if you were raped, they couldn't treat you like that anymore. I thought there was a law against it."
>
> We all thought that there was a law against it, but the Glen Ridge trial has shown the women of this State that the current Rape Shield Law is intrinsically flawed and does not accomplish the purpose for which it was enacted. 136a to 137a.

The Director of Sexual Assault Services at Rutgers put the case in its broader systemic context: "[A]lthough Glen Ridge has obtained a tremendous amount of notability, let me reassure you that what happened in that courtroom happens everyday in courtrooms throughout the State." 149a. She recalled how "[d]ay after day, hour after hour, I talk and work with women and some men who choose not to legally pursue their victimization for fear both of direct and intimate accounts of their current and past history, not only sexual but all components that help us to erroneously judge a person. . . . I thought of those who never tell anyone for fear of losing their last shred of personal control. I understand that we can't return to them what has been taken away. But I ask that you support A-677 [which became the 1994 amendment] in an attempt to tighten the court's discretion, focus the proceedings where they belong and away from irrelevant conduct." 150a.

Others testified similarly ("[a]fter seeing what happened in our Glen Ridge case, victims are genuinely scared to report rapes at all") 152a; ("[a]lthough the Glen Ridge trial made it very clear that there were loopholes in the Rape Shield Law,

the loopholes had been apparent to rape victims and their advocates for many, many years") 161a.

The sponsor to the 1994 amendment stated that the bill "strives to protect the defendant's [Sixth] Amendment rights to confront and cross-examine witnesses while preserving the victim's right to a courtroom examination that focuses on the charges rather than the victim's sexual history. . . . We must say to the women of New Jersey, report the crime of rape, and we will not vilify or crucify you in the courtroom. Report rape and you will be handled with sensitivity. Your rights will be no less than those of your attacker. Your body has been violated; your privacy will not be violated." 164a.

In short, much concern relating to rape shield laws (in New Jersey and nationally) focused on trial court discretion, which was seen as being exercised so permissively as to undermine the law's remedial goals. The New Jersey Legislature moved to curtail that discretion with the provisions at issue. It thus sought to "place[] [additional] restrictions on a defendant's ability to introduce evidence of the rape victim's past sexual conduct." Assembly Judiciary, Law and Public Safety Committee, *Statement to Assembly Bill No. 677*-L. 1994, c. 95, at 1 (Jan. 20, 1994). 124a. In so doing, "the Legislature clearly intended to protect victims of sexual assault to the maximum extent permissible under the state and federal constitutions." 40a. As the *Assembly Statement* provides:

> It is vitally important to assure rape victims that they will not themselves be put on trial if they press charges against their attackers. This bill is intended to strike an appropriate balance between protecting a defendant's constitutional rights, and protecting a rape victim from an assault upon the victim's character. It is in the public interest to protect the privacy of the victim, as opposed to allowing the defendant to freely examine the victim's past when

> the examination serves no material or relevant evidentiary or constitutional purpose. 124a to 125a.

As noted, the Supreme Court of New Jersey never examined the central issue of whether this amendment was arbitrary or disproportionate to its purpose. But as the above demonstrates, this attempt to direct judicial discretion and limit it as far as constitutionally possible is laudable, given the public interests at stake.

Indeed, it has been said in this very context that channeling discretion in this exact manner is key to an effective rape shield scheme. One commentator aptly describes the precise challenge that the New Jersey Legislature addressed and attempted to resolve:

> [S]ituations occur in which evidence of the complainant's prior sexual conduct is highly relevant to impeach the complainant, rebut an element of the government's case or support an affirmative defense. In these situations, exclusion of such evidence would deprive the defendant of the right to present evidence or to confront his accuser. *The challenge presented is to permit a defendant to offer such evidence in appropriate cases, without allowing the exceptions to, in effect, swallow the rule, thereby returning the law to the status quo ante.*

Fishman, *Consent, Credibility, And The Constitution: Evidence Relating To A Sex Offense Complainant's Past Sexual Behavior*, 44 Cath. U. L. Rev. 709, 723-24 (1995) (emphasis added).

Moreover, there is quantitative support for New Jersey's legislative response to this issue, demonstrating that if rape shield laws are to achieve their desired ends, they should include elements that curtail discretion. In Spohn and Horney, *Rape Law Reform, A Grassroots Revolution and Its*

Impact (Plenum Press 1992), a multijurisdictional study concluded that of six states examined, the one to experience a significant increase in reporting rates to police by rape victims in the aftermath of rape reform legislation was Michigan. *Id.* at 100-102. Michigan was also the state with the strongest rape shield statute among those studied, enacted as part of a comprehensive reform package. *Id.* at 26. As the authors concluded: "The strong and comprehensive laws enacted in Michigan were more than a symbolic response to a vocal constituency clamoring for change. The laws defined new crimes, mandated new procedures, *and limited the discretion of criminal justice officials.*" *Id.* at 173 (emphasis added). That is exactly what the New Jersey Legislature sought to do here as well.

With one fell swoop, however, the New Jersey Supreme Court has returned us to the *status quo ante* -- exactly where we were when the Glen Ridge trial convened. But far from being arbitrary or disproportionate, the balancing test the New Jersey Legislature engrafted onto our Rape Shield Statute is, as has been seen, perfectly appropriate. How it fails on a constitutional level because it contains modifiers requiring that the evidence of past sexual history be "highly" material and that its probative value "substantially" outweigh its prejudicial effect, is never explained by the New Jersey Supreme Court.[2]

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[2] The New Jersey Supreme Court makes clear that it is those very adverbs that somehow doom the provision at issue: "An unconstrained reading of the Statute leads to the exclusion of prior sexual conduct unless it is *highly* material and its probative value *substantially* outweighs its prejudicial effect. . . . Accordingly, evidence of prior sexual conduct that is only material (not highly material) and that only has probative value outweighing (not substantially outweighing) its prejudicial impact would not be admissible at trial. That formulation of the Shield Statute would keep from the jury evidence that is admissible under the Confrontation and Compulsory Process Clauses" of the Sixth Amendment. *State v.*

(continued...)

That is because no valid explanation exists. Indeed, the New Jersey Legislature hardly went out on a limb by incorporating this test onto this statute. The very test deemed facially invalid by the New Jersey court is no different from that already found in evidence laws around the country. In that regard, the test is found in Fed.R.Evid. 609(b), as well as its numerous state analogs, concerning the admissibility of criminal convictions that are more than ten years old.[3] Like N.J.Stat.Ann. 2C:14-7a, these evidence rules are tantamount to, as the New Jersey Supreme Court described below, a "complete reversal" of Evidence Rule 403 since they, too, require findings that the "probative value of [the evidence] substantially outweighs its prejudicial effect" before the convictions at issue can be used for impeachment purposes.

And despite the identical nature of its balancing test, no court has ever deemed either Fed.R.Evid. 609(b) or its state equivalents to be facially invalid under the Sixth Amendment when applied to defense efforts to use such convictions to cross-examine prosecution witnesses. Rather, the courts have

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[2](...continued)
Garron, 177 N.J. at 172, 827 A.2d at 258. 23a.

[3] 23 States have, in their rules of evidence, the same balancing test as found in Fed.R.Evid. 609(b), concerning the introduction of convictions that are more than ten years old. Those are Alabama, Ala.R.Evid. 609(b); Arizona, Ariz.R.Evid. 609(b); Delaware, D.R.E. 609(b); Idaho, I.R.E. 609(b); Indiana, Ind.R.Evid. 609(b); Iowa, Iowa Ct.R. 5.609(b); Kentucky, K.R.E. 609(b); Minnesota, Minn.R.Evid. 609(b); Mississippi, M.R.E. 609(b); New Hampshire, N.H.R.Evid. 609(b); North Carolina, N.C.R.Evid. 609(b); Ohio, Ohio R.Evid. 609(b); Oklahoma, Okla.Stat.Ann. 2609(B); Pennsylvania, Pa.R.E. 609(b); South Carolina, S.C.R.Evid. 609(b); South Dakota, S.D.R.Evid. 19-14-13; Tennessee, Tenn.R.Evid. 609(b); Texas, Tex.R.Evid. 609(b); Utah, Utah R.Evid. 609(b); Vermont, Vt.R.Evid. 609(a)(2); Washington, Wash.R.Evid. 609(b); West Virginia, W.V.R.Evid. 609(b); and Wyoming, Wyo.R.Evid. 609(b).

consistently done what the New Jersey Supreme Court should have done here; determine whether the rule was *applied* in a particular case in a manner comporting with a defendant's constitutional right to confront and cross-examine witnesses against him.

Indeed, all state and federal courts to address claims that Fed.R.Evid. 609(b) or its equivalent was applied so as to infringe on Sixth Amendment rights have, with no difficulty, disposed of those claims in fairly routine fashion, without a hint that an "unconstrained reading" of the balancing test itself was constitutionally problematic. See *United States v. Lochmondy*, 890 F.2d 817, 824 (6th Cir. 1989); *United States v. Peak*, 856 F.2d 825, 830 (7th Cir.), cert. denied, 488 U.S. 969 (1988); *United States v. Decker*, 543 F.2d 1102, 1104-05 (5th Cir. 1977); *State v. Jones*, 117 Wash.App. 221, 231-34, 70 P.3d 171, 176-78 (Ct. App. 2003); *Stephenson v. State*, 742 N.E.2d 463, 486-87 (Ind. 2001), cert. denied sub nom, *Stephenson v. Indiana*, 534 U.S. 1105 (2002); *State v. Carter*, 228 Conn. 412, 429-432, 636 A.2d 821, 831-32 (1994);[4] *State v. Prutting*, 40 Conn.App. 151, 160, 669 A.2d 1228, 1235 (Ct. App.), certif. denied, 236 Conn. 922, 674 A.2d 1328 (1996); *Johnson v. State*, 2002 WL 1227209, *1 (Tex. Ct. App. 2002); *People v. Vasquez*, 1996 WL 33349372, *2 (Mich. App. 1996). No court has suggested, as the New Jersey Supreme Court has, that such a standard would inevitably lead to rulings that violate the Sixth Amendment.

Interestingly, in *People v. Redmon*, 112 Mich.App. 246, 315 N.W.2d 909 (1982), a panel of the Michigan Court of Appeals addressed that state's version of Evid.R. 609(b), which placed an *absolute* bar on the introduction of

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[4] Although Connecticut does not have an evidence rule mirroring Fed.R.Evid. 609(b), it applies the same test as a matter of its common law. *State v. Carter*, 228 Conn. at 431, 636 A.2d at 831.

convictions that are more than ten years old. To conform that categorical rule to the defendant's Sixth Amendment rights, the court superimposed the very same balancing test at issue here and directed the trial court to admit the prior convictions of the state's witness "only if the court finds that their probative value substantially outweighs their prejudicial effect." 112 Mich. App. at 258, 315 N.W.2d at 915. Thus, that court used the balancing test at issue as a model by which to reconcile a *per se* rule with a defendant's right to confront witnesses.[5]

In any event, given its plain terms, there is no doubt that the balancing test at issue is tilted toward exclusion. That is its very design -- as the legislative history to the 1994 amendment makes plain. In that manner, courts have noted with respect to Fed.R.Evid. 609(b), that it creates a "presumption" against admitting old convictions. *United States v. Pope*, 132 F.3d 684, 687 (11th Cir. 1998); *United States v. Tisdale*, 817 F.2d 1552, 1555 (11th Cir. 1987); *United States v. Reeves*, 730 F.2d 1189, 1196 (8th Cir. 1984). Also, it is recognized that the intent of that rule is to give the trial courts "narrow and limited discretion," and to "hedge[] the exercise of that discretion about by a clearly defined constraint." *United States v. Cavender*, 578 F.2d 528, 532 (4th Cir. 1978).

That, of course, is precisely what the New Jersey Legislature sought to accomplish here as well. Given the established impact of this balancing test on judicial discretion, it chose one that would accomplish that goal, without raising constitutional doubts. Or so it thought. Unfortunately, the New Jersey Supreme Court grievously misread this Court's

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[5] In *People v. Carter*, 128 Mich.App. 541, 341 N.W.2d 128 (1983), rev'd o.g. sub nom, *People v. Woodward*, 422 Mich. 941, 369 N.W.2d 852 (1985), another panel of the same court held that the automatic exclusion rule at issue did not violate the right to confrontation.

Sixth Amendment jurisprudence and, in the process, cast doubt on the evidence rules of the federal government and a number of states.

The State of New Jersey, therefore, respectfully urges this Court to right an erroneous constitutional ruling that unduly restricts the state's power to advance social and law enforcement policy. Holding a balancing test to be constitutionally infirm merely because it contains modifiers designed to limit discretion is precisely the sort of "fine tuning" of evidence rules that this Court has denounced. It is also illustrative of a propensity among state courts to overread this Court's Sixth Amendment precedents in this specific area of law, to the detriment of law enforcement and rape victims everywhere.

CONCLUSION

Based on the foregoing arguments, petitioner respectfully urges that this petition for writ of *certiorari* be granted.

Respectfully submitted,

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Of Counsel and on the Petition
Dated: October 21, 2003

APPENDIX

SUPREME COURT OF NEW JERSEY
A-16 September Term 2002

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANDERSON GARRON,

Defendant-Appellant.

Argued March 4, 2003 - Decided July 23, 2003

On appeal from the Superior Court, Appellate Division.

Edwin J. Jacobs, Jr., argued the cause for appellant (*Jacobs & Barbone*, attorneys; *Joseph A. Levin* and *Arthur J. Murray*, on the briefs).

Paul H. Heinzel, Deputy Attorney General, argued the cause for respondent (*Peter C. Harvey*, Acting Attorney General of New Jersey, attorney).

Mark H. Friedman, Assistant Deputy Public Defender, argued the cause for *amicus curiae*, Office of the Public Defender (*Yvonne Smith Segars*, Public Defender, attorney).

The opinion of the Court was delivered by

ALBIN, J.

A jury convicted defendant of aggravated sexual assault, rejecting his defense that the victim consented to have sexual relations with him. In a split decision, the Appellate Division affirmed. We must determine whether the trial court properly

applied the Rape Shield Statute, *N.J.S.A.* 2C:14-7, in excluding evidence of the victim's past relationship with defendant. Defendant claims that the excluded evidence would have explained the events leading to the sexual encounter and to the victim's consent and, therefore, was critical to a fair trial. The State claims that the victim's prior conduct did not possess sufficient probative value on the ultimate issue before the jury, whether defendant forced the victim to perform a sexual act against her will. In these competing arguments are found the tension between defendant's right to confrontation and the compulsory process of witnesses, and the victim's right to be free from an unnecessary invasion of her privacy. We conclude that the trial court misapplied the Rape Shield Statute in keeping from the jury highly relevant evidence that was necessary for a fair determination of the case and, therefore, reverse and remand for a new trial. We also conclude that at the new trial, the court must charge the jury with any lesser-included offenses that are clearly indicated by the evidence, even in the face of objections by the defense or the State. A jury cannot be denied the opportunity to find guilt on a lesser-included offense as a result of the strategic posturing of the parties.

I.

A Cumberland County grand jury indicted defendant Anderson Garron for first-degree aggravated sexual assault, *N.J.S.A.* 2C:14-2a(4), third-degree aggravated criminal sexual contact, *N.J.S.A.* 2C:14-3a, and second-degree official misconduct, *N.J.S.A.* 2C:30-2a, as a result of an encounter on September 28, 1998, between the victim, J.S., and defendant. The precise nature of that encounter was sharply contested by J.S. and defendant at trial. J.S. asserted that defendant raped her, whereas defendant claimed that the two engaged in a consensual sexual act. The history of the relationship between J.S. and defendant became the central focus of the pretrial proceedings and the trial itself.

J.S. worked as a secretary in the Cumberland County Prosecutor's Office from 1992 until March 1997, and then became a communications operator at Southern State Prison. During that period, defendant was a City of Bridgeton police officer, and his wife, Stephanie Garron (Mrs. Garron), was a detective at the same prosecutor's office. While employed at the prosecutor's office, J.S. saw defendant several times every month when he visited his wife. J.S. viewed her relationship with both Garrons as "friendly," until the day defendant "came to [her] house and . . . raped [her]."

A. *Rape Shield Hearing*

In support of his consent defense, defendant sought to introduce testimony concerning J.S.'s conduct toward him in the years leading up to what he claims was a voluntary sexual encounter. In accordance with the Rape Shield Statute, the trial court conducted a pretrial hearing to determine the admissibility of evidence concerning the relationship between J.S. and defendant. *N.J.S.A.* 2C:14-7a, -7d. The nature of that relationship was graphically detailed through the testimony of five witnesses: defendant; his wife, Mrs. Garron; and three of J.S.'s former colleagues from the prosecutor's office.

Defendant testified that "every time" he visited his wife at the prosecutor's office J.S. would "flirt" with him. At times, "she would reach up around [his] neck and pull [him] down and give [him a] hug and brush herself against [him]." When they passed in the hallway, she would "bat her eyes" and "just smiling bump into [him]," and then as they engaged in conversation, she would "rub [his] arm or touch [his] chest." J.S. would tell defendant that he "spoiled [his] wife," that he "was too good to [his wife]," and that he "needed somebody like her." Additionally, she remarked that "she would like to have a white man like [him]" and that his wife "didn't deserve all the things she got." On one occasion, J.S. "grabbed [his] rear end" as he "was walking up the steps at

the Prosecutor's Office." J.S. did not say anything, "she just kind of smiled." Much of J.S.'s conduct toward and banter with defendant was in the presence of other prosecutor's office employees, including defendant's wife. On her last day at the prosecutor's office in 1997, J.S. had defendant walk "to the corner of the building so [they] couldn't be seen from the front windows and she gave [him]" a "rather passionate kiss."

In the spring of 1998, defendant learned that a Fairfield Township bench warrant had been issued for J.S.'s arrest for failure to resolve a seatbelt violation summons. He went to J.S.'s house and told her that "she had a warrant out for a hundred bucks, to get it taken care of," and that she could post bail without having to be arrested. Several weeks later, when defendant discovered that the arrest warrant was still active, he returned to J.S.'s house to tell her "to get this thing taken care of." In the middle of July, defendant, while on duty, received a dispatch that J.S. was at the municipal building and "wanted to see [him] . . . to pay for the warrant." Defendant handled the paper work on the warrant and gave J.S. a receipt. Defendant described what happened next: I stood up to walk her out and she says you know you deserve a big old hug and kiss for this because I didn't put her in jail. And she came over like she always did and put her arm around my shoulders and . . . kissed me again like the day she left work. And then she just kind of went hmmm. And that was it she left.

Approximately two weeks later, defendant was standing on the porch of the prosecutor's office waiting for his wife, when J.S. pulled up in her car. In response to a comment made by J.S., defendant said, "are you ready to have an affair now?" "Now that I don't have to look at your wife anymore, you're damn right," replied J.S. With that, defendant told her to give him a call. J.S. left just as defendant's wife came onto the porch. Defendant told his wife that she "better watch it, [J.S.] is ready to fool around."

Defendant's wife, Mrs. Garron, a detective at the prosecutor's office since 1989, testified about the flirtatious behavior between her husband and J.S. and J.S.'s "outrageous" conduct. Mrs. Garron described J.S. as a "touchy feely person." J.S. would always "grab" and "hug" defendant, and "touch" his face, arm, and chest. J.S. would have full body contact with defendant with her "breast" and "butt." J.S. was not discreet in the attention she lavished on defendant; her behavior was open and notorious. Over the years, J.S. would make bold comments to Mrs. Garron, seemingly in jest, that nevertheless suggested she had designs on defendant. J.S. told Mrs. Garron that "she was going to take [her] husband" and that "she was available" now that she was "in between husbands." She also remarked, "I'll take that man away from you if he spends just one night with me." J.S. thought nothing of stepping between Mrs. Garron and her husband, even in the presence of other people, and going on a riff: "[Y]ou don't need to talk to her, . . . you've got me. You know if you were with me, . . . you'd throw rocks at her. . . . [W]hat do you want with that scrawny white girl." J.S. would often make suggestive remarks to defendant, such as, "I love a man in uniform, is that your gun or are you happy to see me." And she would constantly "give [defendant] a kiss, grab his arm, hold his hand, [and] literally try to pull him away." For her thirtieth birthday present, in 1996, J.S. announced that she wanted defendant: "They don't make men like [defendant] anymore. Where did you find [him]." Sometime in 1995 or 1996, Mrs. Garron learned, apparently from Barbara Carney, a secretary at the prosecutor's office, that J.S. had touched defendant's buttocks. Mrs. Garron confronted J.S., who did not deny the incident: "She laughed. . . . [a]nd she went into this little routine that she does and she said I'm sorry but . . . I was overwhelmed, you know, and she was fanning herself. It was right there in front of me[,] I had no choice."

On J.S.'s last day of employment at the prosecutor's

office in March 1997, J.S., defendant, and Mrs. Garron were on the office porch together, and Mrs. Garron told defendant to kiss (assuming just a peck) J.S. goodbye: "I said the thorn in my side is gone . . . [Y]ou two don't ever have to see each other again." J.S. told Mrs. Garron to go in the building because "I got to kiss your husband goodbye. I'm never going to see him again." Mrs. Garron laughed and did go inside. When J.S. returned to the building, with a dramatic flourish, "she threw herself up against the wall" and fanned herself with her hand, saying, "that is some man. . . . [T]hat man can kiss. Whenever -- whenever you need to get rid of him you just send him my way girlfriend."

Mrs. Garron also recalled an incident after one of J.S.'s visits to the prosecutor's office in the summer of 1998. J.S. had been speaking with defendant and Carney on the porch, and Carney told Mrs. Garron as J.S. drove away, "you know [J.S.] says that she's going to have an affair with your husband now that she doesn't have to look at you every day." On another visit in September 1998, approximately three months after the Garrons had separated and two weeks before the alleged rape, J.S. spoke with Mrs. Garron on the porch of the prosecutor's office. J.S. "was down" and advised Mrs. Garron that "she needed to find a way not to work anymore" and "to find me a man."

Wendy Frost, a secretary at the prosecutor's office throughout J.S.'s tenure, gave testimony that corroborated to a large degree the accounts of defendant and his wife. In Frost's view, J.S.'s behavior "went beyond flirtation." Frost estimated that J.S. approached defendant every time he came to visit his wife at the prosecutor's office, which was as often as every other week. During defendant's visits, "[J.S.] would immediately get up from her desk" and "interact" with him, by "touching his shoulder, [and] grabbing his arm." When defendant talked with Mrs. Garron, "[J.S.] would get up and stand extremely close to [defendant]" and "make sure she brushed up against him." On those occasions, "she would

grab his arm" and "touch[] his upper shoulder." J.S. constantly made inappropriate remarks, such as "if your wife's never around let me know. . . . I can take care of you." Frost recalled the remarks by J.S. that stood out most prominently in her mind. One day, Frost, Mrs. Garron, and defendant were out on the porch of the prosecutor's office smoking when J.S. appeared. With regard to Mrs. Garron's plans to visit her family in Virginia, J.S. commented that "she would have no problems going to see [defendant] while [Mrs. Garron] was away." Frost opined that Mrs. Garron had always taken J.S.'s behavior toward defendant "lightly," but not "as a joke." Though Frost was unable to give specific dates of the many incidents, her memory of them had not dimmed.

Terri Seay, another secretary at the prosecutor's office throughout most of J.S.'s tenure, also testified about J.S.'s "very flirtatious behavior" toward defendant. J.S. brushed her "breast area" against defendant's arm and chest on more than one occasion. It seemed that "every time [defendant] was [in the prosecutor's office] she would be somewhere around him." J.S. would go over to defendant and "put her arm on his arm" or "give him a hug" with her arms around his neck. J.S. said that "she liked a man in uniform." Seay had heard that on J.S.'s last day of work at the prosecutor's office, J.S. commented that she was free to "flirt with [defendant]" since she would no longer be working with Mrs. Garron. Nevertheless, Seay believed that J.S. and Mrs. Garron were "friends." Although the incidents occurred during J.S.'s tenure, Seay was unable to give specific dates between September 1992 and March 1997.

Carney, who worked at the prosecutor's office throughout J.S.'s tenure, claimed that she did not see J.S., defendant, and Mrs. Garron together very often. On those occasions when she did, J.S. just "act[ed] like herself. . . . always happy and talkative." Carney did not recall ever seeing J.S. touch defendant, or ever discussing defendant with

J.S. or Mrs. Garron. At trial, however, Carney testified that J.S. told her that defendant had visited her home in the summer of 1998. Two months before the incident at issue, J.S. had asked Carney whether the Garrons were separated. Carney confirmed that they were.

The trial court determined that defendant had presented clear and convincing evidence to dispel the presumption under *N.J.S.A.* 2C:14-7b against admitting evidence of J.S.'s sexual conduct more than one year before the alleged sexual assault. The trial court, however, ruled that only three of the above-described alleged incidents would be admissible at trial: (1) that J.S. had "grabbed" defendant's buttocks in 1995 or 1996; (2) that she had kissed him passionately in March 1997, on her last day of work at the prosecutor's office; and (3) that she had kissed him similarly in July 1998, after he helped her to resolve the bench warrant. The court concluded that those incidents were admissible under *N.J.S.A.* 2C:14-7d because they were "relevant to show that J.S. consented to the sexual conduct" at issue by demonstrating "a continuing course of conduct on the part of J.S. to engage in sexual conduct with the defendant." The court decided that the remainder of J.S.'s conduct was merely "flirtatious," rather than "sexual," and was therefore not probative of whether she might have actually consented to perform oral sex on September 28, 1998. The court also concluded that the testimony to be excluded did not specify with sufficient particularity the dates between September 1992 and March 1997, that the alleged "sexual conduct, such as hugging and flirting," occurred.

Frost and Seay therefore did not testify at trial. Defendant and Mrs. Garron were not permitted to testify to the catalogue of flirtatious and sexual behavior of J.S., including J.S.'s seeming obsessive attention to defendant, her habit of brushing her body parts against defendant, her constant petting of his arm, chest and face, her many come-on remarks, such as he "needed somebody like her" and was

"too good" to his wife, her affirmative response to defendant's inquiry, "are you ready to have an affair now," and her comments that she wanted defendant for her thirtieth birthday and that she was "available" while she was between husbands.

B. *Trial*

In many ways, the accounts given by J.S. and defendant of their encounter were strikingly similar. How each viewed those events was strikingly different. According to J.S.'s trial testimony, on September 28, 1998, at approximately 3:30 a.m., she was getting ready for her 4:30 a.m. shift at the prison when she heard a knock at the door that separated her dining and laundry rooms, and served as her home's back door. Defendant was at the door, on duty, and in uniform. He informed J.S. that he had been "riding by and noticed that the light was on inside [her] car," and just wanted to "mak[e] sure everything was okay." After they inspected the car together, J.S. concluded that her son had probably left the light on, because he often played in the car. Defendant remarked that the car of J.S.'s "boyfriend" was not parked in the driveway, and J.S. replied that she had "kicked him out."

Defendant then followed J.S. back into the laundry room, uninvited, and asked, "Don't I get a hug for this?" J.S. hugged and thanked defendant. When he attempted to kiss her, J.S. resisted, saying, "Andy, I got to go. . . . I got to get to work," and "I don't want to do this. I know your wife. I know Stephanie. And I cannot do this." Defendant grabbed J.S.'s shoulders, "looked [her] dead in [the] face," and said, "Look, I want to see what I been missing all this time." He then pressed her down to her knees with his hands, exposed his erect penis with his right hand, and removed his duty weapon from its holster and placed it within arm's-reach on

a nearby dresser.[1] J.S. stopped protesting and trying to stand up when she noticed that the gun's red laser-sight shone against a wall in the laundry room. She believed that meant the gun was fire-ready, and "just needed one little nudge" to shoot.

After defendant tapped J.S.'s lips with his penis, she put it in her mouth. J.S. gagged and tried to back away, hoping that "if [she] didn't do it right and give him what he wanted he would just stop." He kept one hand on her shoulder, and the other on his penis. When J.S. thought he was about to ejaculate, she attempted to stand up, but defendant told her "to get back down there." She did, and "just kept [her] eye on the gun, making sure it was still in the same spot." When she began to gag again, defendant grabbed the back of her head and ejaculated into her mouth. He then "finished himself off" by masturbating, and said, "This is going to be our secret, right?," and left.

J.S. did not immediately report the incident, for fear of retaliation. She rinsed her mouth with rubbing alcohol and then drove to work. She disclosed the incident to two co-workers at the prison approximately eight hours later, and said that she had been afraid "the gun might accidentally go off." One of those co-workers testified about J.S.'s distraught state and that J.S. had informed her that she had been sexually assaulted. J.S. reported the incident to law enforcement authorities the following morning.

J.S. testified that defendant "stopped by" her home "about five or six times" while he was on daytime duty between the spring of 1998 and July 16, 1998. He never stayed more than three minutes, and was "[j]ust making sure

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[1] On cross-examination, J.S. testified that defendant immediately removed his weapon and placed it on a dresser to his right upon re-entering the laundry room, before he kissed her, grabbed her shoulders, and pressed her to her knees.

everything was okay." On one of those occasions, defendant introduced J.S. to his partner. On another occasion, J.S. invited defendant to speak with her ten-year-old son, who had been "acting up in school. . . . [She] asked [defendant] to come in the house to act like he was going to take [her son] to jail if he didn't start straightening up." Defendant spoke briefly with her son and left.

As to prior sexual conduct with defendant, J.S. stated that she had never touched defendant anywhere on his body in a sexual way before the kiss of July 16, 1998. She claimed that defendant had initiated that kiss and put his tongue into her mouth, and that she was "shocked." She denied ever touching defendant's buttocks or having any conversation with Mrs. Garron about that alleged incident. She also insisted that the alleged March 1997 "goodbye" kiss outside the prosecutor's office and subsequent conversation with Mrs. Garron never occurred, and that defendant had merely kissed her on the cheek in the office, "like everybody else did," at her going-away party. Finally, J.S. noted that she had filed a tort claim against defendant and the City of Bridgeton as a result of the September 28, 1998 incident, and that she was seeking "punitive damages."

When defendant was arrested, he admitted that he had had oral sex with J.S., but insisted that it was consensual. He adamantly denied "finishing himself off" by masturbating. According to his trial testimony, J.S. invited him in after they inspected her car together, and said that he "deserve[d] a hug and a kiss for this too." As they kissed, J.S. stroked defendant's groin through his trousers, unzipped his pants, and exposed his penis. She then "slid down in front of [him] and began to perform oral sex." Defendant put his hands on his hips and "leaned backwards." As J.S. unfastened his uniform belt to undress him, defendant's trousers and the attached tools began falling to the floor, so he removed his gun with his right hand and laid it on a nearby surface to his right for safekeeping. Defendant did not recall or believe that

the laser-sight of the gun was activated because the pressure-sensitive switch for that function was on the right side of the weapon, and he would have laid the gun down on its left side as he is right-handed. When J.S. finished, they kissed, and she whispered that "it was her turn." Defendant said, "I'll have to owe you one," dressed, and left.

Defendant and J.S. both testified that he called her the next evening to inquire about her work schedule, and said he was "[h]urt" that she did not recognize his voice. She was in her son's room when defendant called and asked him to call her back. He said that he could not call back, but gave J.S. his phone number at the police station so that she could call him back. She never did. The only trial testimony permitted concerning J.S.'s prior conduct was the buttocks-grabbing incident and the passionate kisses of March 1997 and July 1998.

At defendant's urging, and over the State's objection, the trial court refused to charge the jury on sexual assault and criminal sexual contact as lesser-included offenses of aggravated sexual assault and aggravated criminal sexual contact. The court concluded that the only evidence of physical force or coercion causing J.S. to submit to those acts was her fear of defendant's service revolver. The jury was thus charged strictly pursuant to the indictment and returned a guilty verdict on each count.

The trial court sentenced defendant to concurrent terms of eleven years of imprisonment for aggravated assault and three years of imprisonment for official misconduct, with an 85% No Early Release Act (NERA) parole disqualifier for each conviction, *N.J.S.A.* 2C:43-7.2, and to a concurrent term of three years of imprisonment on the aggravated criminal sexual contact conviction. Defendant's Graves Act parole disqualifiers, *N.J.S.A.* 2C:43-6c, were subsumed by the NERA disqualifiers. The court also sentenced defendant to Megan's Law reporting requirements. *N.J.S.A.* 2C:7-1 to

II.

In an unreported split decision, the Appellate Division affirmed defendant's convictions and remanded to the trial court for amendment to the judgment of conviction to reflect defendant's mandatory forfeiture of public office and debarment from future public employment for official misconduct. The Appellate Division majority concluded that even though the trial court described the excluded evidence of J.S.'s prior conduct as "flirtatious, . . . not sexual," that evidence was properly excluded as non-probative "sexual conduct" within the meaning of the Shield Statute, because it was offered to prove consent, and was "not specific enough to be probative of whether a reasonable person would have believed that J.S. freely and affirmatively consented to the sexual conduct on September 28." The majority found that conclusion was supported by the trial court's finding that J.S.'s conduct was "'taken lightly' by the parties," and by the witnesses' inability "to specify dates, circumstances, or precise times and locations" for the alleged conduct. The majority reasoned that even if the exclusion of that evidence was an abuse of discretion, it was harmless because the jury had been made "well-aware" of J.S. prior "sexual advances" toward defendant through the admission of evidence concerning the alleged buttocks grabbing and two passionate kisses. The majority also held that the trial court's failure to charge the lesser-included offenses proposed by the State was invited, not plain error.

Judge Wecker dissented, finding that the proposed testimony concerning J.S.'s prior "flirtatious" conduct was erroneously excluded, because whether or not such evidence fell under the Shield Statute, it was "highly relevant and material to the delicate weighing process on the credibility of defendant and J.S." as to consent, and it "had no potential for invading J.S.'s privacy, or for unduly prejudicing or

confusing the jury." Judge Wecker viewed the trial court's ruling as censoring from the jury critical evidence that had a significant potential of altering the outcome of the case.

> The jury heard about three incidents of physical contact which the judge deemed relevant, but the jury never heard substantial available evidence from several witnesses of J.S.'s explicit verbal invitations to defendant. And the jury heard only a fraction of the available evidence of J.S.'s expressed desires with respect to him, that coming from Mrs. Garron and not from the two independent witnesses. The excluded remarks were highly relevant and material to the delicate weighing process on the credibility of defendant and J.S. . . . To artificially distinguish past encounters between defendant and J.S. on the ground that some were "merely flirtatious" reflects a failure to appreciate the legitimate and compelling purpose for which the evidence was offered. Moreover, the precise dates of each comment were unnecessary to establishing threshold reliability, especially after the judge found that the one-year presumption of *N.J.S.A.* 2C:14-7b was overcome with respect to the incidents that were admitted.

Judge Wecker also concluded that the trial court's failure to charge the proposed lesser-included offenses at defendant's request constituted reversible error, because the public interest in fair and proper convictions outweighed defendant's interest in the trial strategy of gambling on an all-or-nothing verdict. She reasoned that the evidence was such that a reasonable juror could have concluded that defendant used only physical force, and never verbally or physically threatened J.S. with his gun.

Defendant's appeal is before us as of right under Rule 2:2-1(a)(2), based on the dissent. We now reverse.

III.

Defendant argues that evidence of J.S.'s six-year course of conduct -- her obsessive attention to him during his visits to the prosecutor's office, her repeated physical contact with him, the verbal come-ons and sexual innuendoes, the kissing, and the banter about having an affair -- "was highly relevant and material" to his consent defense and, therefore, admissible under *N.J.S.A.* 2C:14-7. He also posits that exclusion of that evidence deprived him of his federal and state constitutional rights to confrontation, compulsory process, and due process. The State contends that the excluded evidence "was not sufficiently probative" of the consent defense and that the trial court properly exercised its gate-keeping function by filtering out the instances of J.S.'s conduct that were remote and of questionable relevance.

At stake in our evaluation of *N.J.S.A.* 2C:14-7 are competing rights: the right of a person accused of a crime to confront his accuser and to present evidence in support of his defense, and the right of a victim to maintain her privacy from unwarranted intrusions into her past. In balancing these competing claims, we must look to the nature and the quality of the evidence offered and the need for that evidence to assure a fair determination of the issues.

A.

New Jersey's Rape Shield Statute restricts a defendant's ability to introduce evidence of the victim's prior "sexual conduct." *N.J.S.A.* 2C:14-7. The overarching purpose of the Rape Shield Statute is to protect the privacy interests of the victim while ensuring a fair determination of the issues bearing on the guilt or innocence of the defendant. The Shield Statute is intended to deter the unwarranted and unscrupulous foraging for character-assassination information about the victim. The Statute does not permit introduction of evidence of the victim's past sexual conduct to cast the victim as

promiscuous or of low moral character. On the one hand, the Shield Statute is intended to encourage the reporting of sexual abuse by assuring victims that they will not be subject to untoward invasions of privacy through excessive and collateral cross-examination of their prior sexual conduct. That objective also recognizes that jury verdicts should not be based on prejudicial excursions into the non-probative private affairs of a victim. *State v. Cuni*, 159 N.J. 584, 597 (1999); *State v. Budis*, 125 N.J. 519, 528-29 (1991). On the other hand, the Statute preserves the core values that are protected by the Federal and State Confrontation and Compulsory Process Clauses -- the right of the accused to present all relevant evidence necessary for the defense and the right to a fair trial. The privacy interests of the victim must be measured against preserving the integrity of the fact-finding process, the objective of which is to achieve a just verdict.

The Shield Statute attempts to strike a balance between those competing interests by setting forth the limited circumstances in which evidence of a victim's previous "sexual conduct" is admissible in the prosecution of a sexual assault case. *N.J.S.A.* 2C:14-7a to -7d. The Statute defines sexual conduct as "any conduct or behavior relating to sexual activities of the victim, including but not limited to previous or subsequent experience of sexual penetration or sexual contact. . . ." *N.J.S.A.* 2C:14-7f. As occurred here, first the defendant is required to make application for an in camera hearing to determine the admissibility of the evidence. *N.J.S.A.* 2C:14-7a. At the hearing, the trial court must determine whether the evidence falls within one of the few exceptions to the general rule prohibiting the use of the victim's prior sexual conduct. The relevant exception here deals with the defense of consent:

> Evidence of the victim's previous sexual conduct with the defendant shall be considered relevant if it is probative of whether a reasonable person, knowing what the defendant knew at the time of the

> alleged offense, would have believed that the alleged victim freely and affirmatively permitted the sexual behavior complained of. [*N.J.S.A.* 2C:14-7d.]

However, before such evidence is admitted several further evidentiary hurdles must be cleared. The Shield Statute only permits evidence of prior sexual conduct if that evidence is "highly material" and "the probative value of the evidence offered substantially outweighs its collateral nature or the probability that its admission will create undue prejudice, confusion of the issues, or unwarranted invasion of the privacy of the victim." *N.J.S.A.* 2C:14-7a.[2] Moreover, "[i]n the absence of clear and convincing proof to the contrary," such evidence "occurring more than one year before the date of the offense charged is presumed to be inadmissible." *N.J.S.A.* 2C:14-7b.

The Shield Statute has been expanded by amendment three times since its 1978 enactment for the purpose of strengthening and expanding the privacy rights of victims.[3] The legislative history to the 1994 amendment reveals that the drafters were concerned specifically about protecting the privacy of a sex-crime victim from collateral examination

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[2] Evidence is relevant if it has "a tendency in reason to prove or disprove any fact of consequence to the determination of the action." *N.J.R.E.* 401. The "probative value" of evidence is its tendency to establish the proposition that it is offered to prove. *State v. Wilson*, 135 N.J. 4, 13 (1994). The "materiality" of evidence concerns the strength of the relation between the proposition for which it is offered and an issue in the case. *State v. Hutchins*, 241 N.J. Super. 353, 359 (App. Div. 1990).

[3] *See L.* 1988, *c.* 69, § 1 (amending former subsection a to include endangering welfare of child prosecutions under *N.J.S.A.* 2C:24-4 among those to which Statute applies); *L.* 1994, *c.* 95, § 1 (amending former subsections a and c, and adding current subsections d and f); *L.* 1995, *c.* 237, § 1 (adding current subsection e to limit admissibility of victim's manner of dress at time of offense).

bearing no relevance to the central issues of the case. The 1994 amendment was "intended to strike an appropriate balance between protecting a defendant's constitutional rights, and protecting a rape victim from an assault upon the victim's character." Assembly Judiciary, Law and Public Safety Committee, *Statement to Assembly Bill No. 677* (Jan. 20, 1994), *reprinted in N.J.S.A.* 2C:14-7 (1995). Through that amendment, the Legislature raised the bar to such evidence from requiring that it merely be

> *relevant and that the probative value of the evidence offered is not outweighed* by its collateral nature or by the probability that its admission will create undue prejudice, confusion of the issues, or unwarranted invasion of privacy of the victim,

[*N.J.S.A.* 2C:14-7a (1988) (emphasis added),][4]

and material to negating the element of force or coercion,

[*N.J.S.A.* 2C:14-7c (1988),]

to requiring that the evidence be

> *relevant and highly material and meet[] the requirements of subsection[] . . . d. . . . and that the probative value of the evidence offered substantially outweigh[]* its collateral nature.

[*N.J.S.A.* 2C:14-7a (1994) (emphasis added).]

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[4] The pre-amendment Shield Statute's admissibility threshold was slightly higher than our general rules of evidence, which provide that "relevant evidence may be excluded if its probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury or (b) undue delay, waste of time, or needless presentation of cumulative evidence," *N.J.R.E.* 403 (emphasis added).

This Court has recognized the tension between the demands of the Confrontation Clause and those of the Rape Shield Statute in interpreting the pre-1994 enactment. See *Cuni*, *supra*, 159 N.J. at 596-99 (addressing 1988 version); *Budis*, 125 N.J. at 529-33 (same). In analyzing whether the restrictions on the admissibility of evidence under the current Shield Statute are constitutional, we must review the jurisprudence of the Confrontation Clause and Compulsory Process Clause to determine whether those clauses compel the admission of evidence that would otherwise be barred by the Shield Statute.

B.

The Federal and New Jersey Constitutions guarantee criminal defendants "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 2146, 90 L. Ed.2d 636, 645 (1986) (internal quotation marks omitted); *Budis, supra*, 125 N.J. at 531 (same). "That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on . . . credibility . . . when such evidence is central to the defendant's claim of innocence." *Crane, supra*, 476 U.S. at 690, 106 S. Ct. at 2147, 90 L. Ed. 2d at 645.

A criminal defendant has the right "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." *U.S. Const.* amend. VI; *N.J. Const.* art. I, ¶ 10. The rights to confront, cross-examine, and produce witnesses have been aptly characterized as "opposite sides of the same coin," because each confers the same fundamental right to elicit testimony favorable to the defense before the trier of fact. David Guy Hanson, *Note, Judicial Discretion in Sexual Assault Cases after State v. Pulizzano: The Wisconsin Supreme Court Giveth, Can the Wisconsin Legislature Taketh Away?*, 1992 Wis. L. Rev. 785, 789 (citing Peter Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for*

Criminal Cases, 91 Harv. L. Rev. 567, 601-06 (1978)). See also Janet C. Hoeffel, *The Sixth Amendment's Lost Clause: Unearthing Compulsory Process*, 2002 Wis. L. Rev. 1275, 1307 (construing rights to confrontation and compulsory process as "sister clauses" which together "make the presentation of a defense at trial complete"). Each has long been recognized as essential to the due process right to a "fair opportunity to defend against the State's accusations," and thus "among the minimum essentials of a fair trial." *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 1045, 35 L. Ed.2d 297, 308 (1973).

Those constitutional rights, however, "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process," such as established rules of evidence and procedure designed to ensure the fairness and reliability of criminal trials. *Id.* at 295, 302, 93 S. Ct. at 1046, 1049, 35 L. Ed 2d at 309, 313; *Budis, supra,* 125 N.J. at 531-32. But when the mechanistic application of a state's rules of evidence or procedure would undermine the truth-finding function by excluding relevant evidence necessary to a defendant's ability to defend against the charged offenses, the Confrontation and Compulsory Process Clauses must prevail. See *Chambers, supra*, 410 U.S. at 302, 93 S. Ct. at 1049, 35 L. Ed 2d at 313; *Budis, supra*, 125 N.J. at 532. The competing state interest served by barring proposed evidence must be "closely examined" when the denial or significant diminution of the rights of confrontation and compulsory process "calls into question the ultimate integrity of the fact-finding process." *Chambers, supra*, 410 U.S. at 295, 93 S. Ct. at 1046, 35 L. Ed. 2d at 309; *Budis, supra*, 125 N.J. at 532. *See also* Cannel, *New Jersey Criminal Code Annotated*, comment 4 on *N.J.S.A.* 2C:14-7d (2003) ("neither statutes nor evidence rules may bar defendant from using evidence and material relevant to his defense where the bar would violate the constitutional right to confront and cross-examine witnesses").

In the seminal case of *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed.2d 347 (1974), the United States Supreme Court determined that a state's procedural rule and statute protecting the privacy of a juvenile's delinquency record had to give way to the superior claim of the Federal Confrontation Clause. In *Davis*, the State's key witness was serving a probationary term for a delinquency adjudication at the time he cooperated with the prosecution and gave testimony implicating the defendant in a burglary. The defense sought to cross-examine the witness on the basis of bias, arguing that because of the witness's vulnerable status as a probationer, he had reason to curry favor with the State. Relying on the state's provisions protecting the confidentiality of a juvenile adjudication, the trial court barred the defense from eliciting on cross-examination the witness's probationary status. While recognizing the privacy interests at stake, the Supreme Court concluded that "[t]he State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness." *Id.* at 320, 94 S. Ct. at 1112, 39 L. Ed. 2d at 356. In reversing the conviction, the Court found that any embarrassment or blemish to the reputation of the juvenile "must fall before the right of [the defendant] to seek out the truth in the process of defending himself." *Ibid.*

In *State v. Budis, supra*, 125 N.J. 519, the trial court, relying on the Rape Shield Statute, significantly restricted the defendant's cross-examination of the nine-year-old victim and a police witness regarding a prior sexual assault on the victim by a person other than the defendant. To explain how a girl of such tender years could describe in detail the sexual acts she attributed to him, the defendant argued that the victim had acquired her source of knowledge of vaginal and oral sex from the prior abuse. *Id.* at 525-27. In concluding that the jurors, as the "sole judges of credibility, were entitled to know that the defendant may not have been the sole source of [the victim's] sexual knowledge," we affirmed the Appellate

Division's reversal of the defendant's conviction of aggravated sexual assault. *Id.* at 541 (internal quotation marks omitted). We found that the child-victim's prior molestation was "necessary," "crucial," and "exquisitely important" evidence to the defense. *Id.* at 533, 537, 541. In arriving at that result, we discoursed on the interplay between the Rape Shield Statute and the Confrontation Clause regarding the admissibility of evidence of prior sexual conduct:

> First, we must ascertain, apart from the Rape Shield Statute, whether the evidence was relevant to the defense. If the evidence is relevant, we then must decide whether its probative value outweighs its prejudicial effect. See *Crane, supra*, 476 U.S. at 689-90, 106 S. Ct. at 2146, 90 L. Ed 2d at 644-45; *Davis, supra*, 415 U.S. at 319, 94 S. Ct. at 1111, 39 L. Ed. 2d at 355. If so, the evidence may not constitutionally be excluded.

[Id. at 532. See also *Cuni, supra*, 159 N.J. at 600 (same).]

Stated a different way, if evidence is relevant and necessary to a fair determination of the issues, the admission of the evidence is constitutionally compelled. *See, e.g., Olden v. Kentucky*, 488 U.S. 227, 229-33, 109 S. Ct. 480, 482-84, 102 L. Ed.2d 513, 518-20 (1988) (holding that right of confrontation was violated by excluding cross-examination concerning rape victim's cohabitation with defendant's half-brother that was "crucial" to consent defense to demonstrate victim's motive to fabricate); *Rock v. Arkansas*, 483 U.S. 44, 52, 62, 107 S. Ct. 2704, 2709, 2714, 97 L. Ed.2d 37, 46, 52-53 (1987) (holding that right of compulsory process was violated by excluding manslaughter defendant's hypnotically-refreshed testimony concerning circumstances of shooting husband that was "material and favorable" to defense that gun accidentally discharged); *Crane, supra*, 476 U.S. at 690-91, 106 S. Ct. at 2146-47, 90 L. Ed 2d at 645 (holding that fair trial required admission of testimony that

was "central" to defense concerning reliability of sixteen-year-old's confession to murder); *Chambers, supra*, 410 U.S. at 294-303, 93 S. Ct. at 1045-49, 35 L. Ed. 2d at 308-13 (holding that rights of confrontation and compulsory process were violated by excluding cross-examination and direct testimony concerning third party's oral and written confessions to murder that was "critical" to defense of third-party guilt); *Washington v. Texas*, 388 U.S. 14, 16, 23, 87 S. Ct. 1920, 1921-22, 1925, 18 L. Ed.2d 1019, 1021, 1025 (1967) (holding that right of compulsory process was violated by excluding co-defendant's testimony concerning circumstances of shooting that was "vital" to defense that co-defendant fired fatal shot).

We must interpret the current version of the Shield Statute in accordance with those constitutional precepts. An unconstrained reading of the Statute leads to the exclusion of prior sexual conduct unless it is *highly* material and its probative value *substantially* outweighs its prejudicial effect. *N.J.S.A.* 2C:14-7a. (The Shield Statute is a complete reversal of *N.J.R.E.* 403, which provides that relevant evidence "may be excluded if its probative value is *substantially* outweighed by the risk of . . . undue prejudice . . . ." *N.J.R.E.* 403(a) (emphasis added)). Accordingly, evidence of prior sexual conduct that is only material (not highly material) and that only has probative value outweighing (not substantially outweighing) its prejudicial impact would not be admissible at trial. That formulation of the Shield Statute would keep from the jury evidence that is admissible under the Confrontation and Compulsory Process Clauses, and the constitutional standard enunciated in *Budis*. We must construe the Statute so that its reach does not exceed its constitutional limits. We reaffirm the test advanced in *Budis* that evidence relevant to the defense that has probative value outweighing its prejudicial effect must be placed before the trier of fact. We do not read the Shield Statute in a way that would deny a defendant a fair trial. In summary, evidence that is relevant and necessary to prove the defense of consent is not excluded

under the Shield Statute.

Those principles must now be applied to the facts. In doing so, we first must say a word on the mystique of language and manners. Men and women express their feelings and desires in many different ways, from the demonstrative and unequivocal to the subtle and suggestive. Communications in the most mundane matters may have many layers of meaning. Interpreting language and conduct concerning our passions and affairs of the heart may be no easier than deciphering hieroglyphics. Some remarks, if taken literally will mean one thing, and if taken in jest another, and if taken half-in-jest, both one thing and another. Unraveling the riddle of the messages we convey through body language and the spoken word requires a high degree of discernment, for often there are surface and underlying meanings. J.S.'s remarks and physical conduct in reference to defendant are susceptible to varying interpretations. One view is that she engaged in office buffoonery, bawdy humor, and innocent but self-indulgent attention seeking. Another view is that she aggressively pursued defendant, using humor as a thinly-veiled cover for her sexual advances. The jury was particularly well suited to divine the true meaning of the language and conduct of J.S. A jury represents a cross section of the citizens of a community, men and women of varying backgrounds and experience who bring an understanding of the everyday practical realities of life. We can trust the jury to distinguish mere playful words and harmless gestures from expressions of sexual desire and sexual advances. Certainly, the trial court was in no better position than the jury to fathom J.S.'s intentions and to understand whether a reasonable person would have believed that J.S. encouraged and ultimately consented to the sexual acts that occurred. In this case, "[t]he role of the factfinder [was] to decide . . . whether . . . defendant's belief that the alleged victim had given affirmative permission was reasonable." *State in the Interest of M.T.S.*, 129 N.J. 422, 448 (1992). Defendant's state of mind was directly at issue. How defendant's prior

relationship with J.S. affected his state of mind was critical to the ultimate determination of the jury.

The trial judge permitted only fragmented pieces of evidence to be presented to the jury concerning J.S.'s relationship with defendant. That judicial censorship did more than distort the true picture of events leading to the sexual encounter ¾ it made less likely that the jury would believe any part of the defense of consent. The trial court allowed testimony by defendant concerning J.S.'s two passionate kisses and her grabbing his derrière. However, J.S. denied that those events ever occurred. Therefore, the truth regarding those incidents and the sexual encounter was reduced to a credibility contest between just two people. Without the testimony of independent witnesses from the Cumberland County Prosecutor's Office who were able to give examples of J.S.'s public shows of affection toward defendant, it was less likely the jury would believe that J.S. passionately kissed defendant and grabbed his buttocks, and that in turn made it less likely the jury would find believable defendant's consent defense. Had J.S. contradicted Frost's and Seay's testimony describing J.S.'s physical advances toward defendant, as well as her sexually alluring remarks, the case would not have boiled down to a "he said-she said" dispute. The credibility determination between J.S. and defendant may well have hinged on the presentation of seemingly disinterested witnesses whose testimony had no partisan flavor, testimony that would have buttressed defendant's assertions. Each piece of evidence delicately supported another in the presentation of the consent defense, and the removal of key pieces of evidence presaged the total collapse of that defense. Applying another metaphor, the jury was given a book with missing chapters.

This Court is sensitive to the rights and concerns of those who file sexual assault complaints and to the objectives of the Rape Shield Statute. We do not expect, as a result of this ruling, that a trial court will admit into evidence irrelevant

and prejudicial material concerning the reputation of a complaining witness. Victims need not be fearful of our judicial process and must know that they will be treated with dignity and fairness. We do not pass on the credibility of the accounts given by J.S. and defendant. We express no view whether defendant would have succeeded had he been given the full opportunity to present his defense. But that opportunity to cross-examine effectively J.S. and present witnesses on his behalf in furtherance of a legitimate defense was his constitutional right. It was for the jury to decide whether the testimony offered by defendant at the Rape Shield hearing was worthy of belief.

The privacy interests of the victim must be measured against preserving the integrity of the fact-finding process, the objective of which is to achieve a just verdict. We cannot say that J.S. had a reasonable expectation of privacy in her past relationship with defendant, much of which was in public view. Even privileges are not absolute. A client or patient waives the protection of the attorney-client privilege or patient-physician privilege when he charges the attorney or physician with malpractice. See *N.J.S.A.* 2A:84A-20(2)(c) (*N.J.R.E.* 504(2)(c)) (excepting from attorney-client privilege "communication[s] relevant to an issue of breach of duty by the lawyer to his client"); *N.J.S.A.* 2A:84A-22.4 (*N.J.R.E.* 506(d)) (excepting from physician-patient privilege communications relevant to "action[s] in which the condition of the patient is an element or factor of the claim or defense of the patient"). Confidences, in those circumstances, lose their protected status if the privileged information is necessary for the defense of the lawyer or doctor. *State v. Bey*, 161 N.J. 233, 296 (1999); *Circle Chevrolet Co. v. Giordano, Halleran & Ciesla*, 142 N.J. 280, 292 (1995), overruled on other grounds by *Olds v. Donnelly*, 150 N.J. 424, 440-43 (1997); *Stigliano v. Connaught Labs., Inc.*, 140 N.J. 305, 311-12, 316-18 (1995). J.S. could hardly expect her relationship with defendant to remain a private matter if information concerning that relationship was necessary for

defendant to receive a fair trial.

In this case, the information withheld from the jury did not concern the victim's intimate relations with persons other than this defendant. The withheld evidence did not paint the victim as a woman with a sordid past, making her allegations unworthy of belief. The withheld evidence, however, did shed light on the victim's relationship with defendant. However unflattering or embarrassing the details, the evidence was offered for a legitimate objective, to support defendant's consent defense. The story left untold by defendant was of a woman infatuated with him and who pursued him aggressively, even in the presence of her fellow office workers and his wife. The defendant needed to explain why he was at the victim's house in the early morning of September 28, why he followed her into the laundry room of her home, and why he reasonably believed she consented to have sexual relations with him. The untidy details of defendant's relationship with J.S. were essential to understanding his side of the story. Selectively editing those details, as the trial court did here, did not advance the truth-seeking function of the trial.

C.

The Appellate Division majority held that all the excluded evidence of J.S.'s prior "flirtatious" conduct with defendant was properly characterized as "sexual conduct" within the meaning of the Shield Statute, in light of its explicit sexual nature and the purpose for which it was offered. *N.J.S.A.* 2C:14-7d, -7f. We do not agree with that characterization of the evidence. For example, J.S.'s remark to a fellow employee that "she would have no problem going to see [defendant]" while his wife was away on vacation does not fit within the definition of "sexual conduct," *N.J.S.A.* 2C:14-7f, and, therefore the standard of admissibility would be governed not by the Rape Shield Statute but by the general standard for relevance in our evidentiary rules, *N.J.R.E.* 401,

403. That much of the prior relationship evidence squarely fits within the term "sexual conduct" is not, however, subject to dispute. J.S.'s alleged touching of defendant's chest or brushing her breasts or buttocks against him while uttering comments to the effect that she was sexually attracted and available to him, "every time" he appeared at the prosecutor's office, might well be construed as "sexual contact" with defendant, as that term is defined in the Code of Criminal Justice. See *N.J.S.A.* 2C:14-1d, -1e (defining "sexual contact" to include intentional touching of victim or actor's buttock or breast through clothing for purposes of sexual arousal or gratification); *N.J.S.A.* 2C:14-7f (defining sexual conduct under the Rape Shield Statute as including "sexual contact"). We need not parse the record to itemize which remarks and conduct were flirtatious or which were sexual because we conclude that the prior relationship evidence, whatever the characterization, was relevant to and necessary for a fair determination of the issues. The verbal and physical conduct, both sexual and flirtatious, was, for the most part, inextricably intertwined in a course of conduct over a six-year period.

The case before us is limited to its unique facts. We do not suggest that in other contexts personal interactions such as a compliment, a hug, or even an occasional off-color comment or joke, should be viewed as anything other than ordinary socializing. The circumstances of each case will determine whether the conduct has bearing on the issue of consent.

Although we do not find it necessary on this record to distinguish flirtatious speech and conduct from sexual conduct under *N.J.S.A.* 2C:14-7f, the issue has been addressed in other jurisdictions with rape shield statutes. See *State v. Detonancour*, 34 P.3d 487, 489, 491 (Mont. 2001) (excluding evidence of prior "flirtatious" conduct of sexual assault victim who pulled defendant onto her lap at birthday party two days before assault on ground evidence did not constitute

"sexual conduct" relevant to consent); *People v. Ivers*, 587 N.W.2d 10, 12-15 (Mich. 1998) (holding that victim's general statement to girlfriend that she was "ready to have sex" prior to party was not "past sexual conduct" governed by rape shield statute, but rather admissible evidence relevant to issue of consent); *Commonwealth v. Killen*, 680 A.2d 851, 852-54 (Pa. 1996) (holding that victim's "flirtatious" and "sexually provocative" statements to medical personnel immediately following alleged rape were not governed by rape shield statute, but rather admissible evidence relevant to victim's credibility); *Villafranco v. State*, 313 S.E.2d 469, 473 (Ga. 1984) (holding that victim's general statement to girlfriend that she wanted to "get some nookey" shortly before accepting ride from alleged assailants was not "past sexual behavior" governed by rape shield statute, but rather admissible evidence of victim's existing motive and state of mind with respect to consent).

We also hold that the excluded evidence of J.S.'s alleged prior sexual conduct with defendant was sufficiently described at the Rape Shield hearing so as to allow a reasonable opportunity for the State to prepare for trial and for the trial court to determine whether the evidence offered was sufficiently probative of consent to meet the requirements of *N.J.S.A.* 2C:14-7a and -7d. See *State v. Rowe*, 316 N.J. Super. 425, 434-36 (App. Div. 1998), certif. denied, 160 N.J. 89 (1999). Although none of the witnesses at the Rape Shield hearing could provide specific dates when the alleged conduct occurred, it is clear from their testimony it took place on at least a biweekly basis for the duration of J.S.'s five-year tenure at the prosecutor's office, and thereafter, in the summer months immediately preceding the September 28, 1998 incident. Where, as here, the alleged conduct is described as a continuing course of conduct at regular intervals within a fixed period of time, the State has adequate notice. Indeed, the trial court and Appellate Division implicitly concluded as much with respect to the alleged buttocks-grabbing incident, even though the date of that

incident was not more specifically described than sometime in 1995 or 1996.

The trial judge found at the Rape Shield hearing that defendant had presented clear and convincing proof of "a continuing course of conduct on the part of J.S. to engage in sexual conduct with the defendant." However, by excluding the vast majority of that evidence, the jury had no inkling of that course of conduct and was left to evaluate the conflicting versions of the incident in question within the confines of the contested buttocks-grabbing and two passionate kisses, each of which occurred more than one year apart and appeared to be wholly unrelated to each other and to the incident in question. The excluded evidence of J.S.'s conduct was relevant and necessary for a fair determination of the witnesses' relative credibility and on the ultimate issue of consent. We therefore conclude that the exclusion of that evidence was "clearly capable of producing an unjust result," R. 2:10-2, and reverse and remand for a new trial.

IV.

At the charge conference, the trial court advised counsel that the jury would be instructed on the lesser-included offenses of sexual assault and sexual contact. Shortly before summations were to begin, in a strategic "crap shoot," defense counsel objected to that procedure. As a consequence, the court agreed not to charge the lesser-included offenses, over the protest of the State. The gamble on an all-or-nothing outcome yielded a result not very satisfying to defendant, who was convicted of aggravated sexual assault and aggravated sexual contact. Defendant now claims that the court committed reversible error by following the very strategy he pressed at trial. Defendant argues that the trial court should have ignored his request because the record clearly indicated a rational basis to charge the jury on the lesser-included offenses. Relying on the doctrine that defendant should not benefit from invited error, *State v. Ramseur*, 106 N.J. 123,

281-82 (1987), the State contends that defendant is barred on appeal from taking a position inconsistent from the one he advanced before the trial court. Stated differently, having got what he wished for, defendant should not now be heard to complain.

In light of our decision to reverse, we need not decide in this appeal whether a defendant will be entitled to a new trial when, in accordance with the defendant's wishes, the trial court fails to charge lesser-included offenses that are clearly indicated in the record. We do conclude, however, that the lesser-included offenses should be charged at defendant's new trial. We take this occasion to remind trial courts that their primary obligation is to see that justice is done, and that a jury is instructed properly on the law and on all clearly indicated lesser-included offenses, even if at odds with the strategic considerations of counsel. We reaffirm that the integrity of the justice system and the fact-finding process is not subordinate to the singular interests of the parties. *State v. Powell*, 84 N.J. 305, 319 (1980). The public interest in a correct verdict based on the evidence must trump the partisan strategic maneuvering of both the State and defendant. In that regard, the words of Chief Justice Wilentz in Powell are quite fitting:

> Very simply, where the facts on record would justify a conviction of a certain charge, the people of this State are entitled to have that charge rendered to the jury, and no one's strategy, or assumed (even real) advantage can take precedence over that public interest. . . . The judge is more than a referee between contestants. He is the law's representative, and it is his duty to see that the will of the law is done. The real function of the adversary system is to help him fulfill that duty.

[Id. at 319.]

No defendant should be convicted of a greater crime or acquitted merely because the jury was precluded from considering a lesser offense that is clearly indicated in the record. In view of this ruling, parties, generally, should not be "surprised" by a court instructing a jury on such a lesser-included offense. Moreover, we cannot foresee specific circumstances that will make defending against a lesser-included offense more unfair or burdensome than defending only against the greater offense, even in those cases in which the defense is alibi or a general denial, "I did not do it." Of course, counsel is still free to argue that the evidence does not support a rational basis for giving a lesser-included jury charge.[5] Nevertheless, in a case in which instructing a jury on a lesser-included offense would be so unanticipated by either party as to cause complete surprise, or so inconsistent with the defense as to undermine the fairness of the proceedings, the trial court may depart from this general rule, but must place its reasons for doing so on the record. *State v. Perry*, 124 N.J. 128, 158-64 (1991); *State v. Choice*, 98 N.J. 295, 300-01 (1985).

On the evidence presented here, defendant would be guilty of first-degree aggravated sexual assault if the jury found he accomplished fellatio with J.S. by threatening her, "by word or gesture," with his gun. *N.J.S.A.* 2C:14-2a(4). However, if the jury found that he accomplished that act through the use of "physical force or coercion" only, and that J.S. did not sustain severe personal injury, defendant could

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[5] If counsel requests a lesser-included charge, the trial court must give that charge if there is a rational basis in the record to do so. *State v. Choice*, 98 N.J. 295, 298 (1985); *State v. Powell*, 84 N.J. 305, 317 (1980). In the absence of such a request, the court need not sift through the record to determine whether any combination of facts would support a lesser charge. *Choice, supra*, 98 N.J. at 299. However, the trial court must give a lesser-included charge, even if not requested by counsel, if it is clearly indicated in the record. *Ibid*; *Powell, supra*, 84 N.J. at 318-19.

only be found guilty of second-degree sexual assault. *N.J.S.A.* 2C:14-2c(1). Similarly, defendant would be guilty of third-degree aggravated criminal sexual contact if the jury found that he masturbated after the fellatio while threatening J.S. with his gun, *N.J.S.A.* 2C:14-2a(4), -3a, but defendant would only be guilty of fourth-degree criminal sexual contact if the jury found that he masturbated without the threat of his weapon, but while using physical force or coercion against J.S., *N.J.S.A.* 2C:14-2c(1), -3b.

As noted by Judge Wecker, the facts supporting the conviction of aggravated sexual assault, even in the absence of consent, were that defendant laid his gun on the dresser, and J.S. was frightened because she saw a red light on the gun and believed that meant that the gun was ready to be fired. There was no evidence that defendant verbally threatened J.S. with the gun, or did anything with it physically, other than place it on the dresser. The jury was presented with two stark choices, either to find defendant not guilty, or to find him guilty of aggravated sexual assault because he was "armed with a weapon" or "threaten[ed] by word or gesture to the use the weapon" to compel J.S. to perform a sexual act. That all-or-nothing alternative did not serve the public interest. There were sufficient facts in the record to support convictions of sexual assault and sexual contact if the jury believed that defendant grabbed J.S., forced her to her knees, placed his penis into her mouth, and held her head as he ejaculated. In addition, the act of sexual penetration itself, without J.S.'s consent, would be sufficient to establish the physical force or coercion required to support a sexual assault conviction. *M.T.S., supra*, 129 N.J. at 447-49.

Accordingly, at the new trial, the jury must be instructed on the lesser-included offenses of sexual assault and sexual contact.

V.

The judgment of the Appellate Division is reversed. The matter is remanded to the Law Division for a new trial consistent with this opinion.

CHIEF JUSTICE PORITZ and JUSTICES LONG, LaVECCHIA, and ZAZZALI join in JUSTICE ALBIN's opinion. JUSTICE COLEMAN filed a separate dissenting opinion. JUSTICE VERNIERO did not participate.

COLEMAN, J., dissenting.

New Jersey's Rape Shield Law, *N.J.S.A.* 2A:84A-32.1 to -32.3, and *N.J.S.A.* 2C:14-7, was enacted "'to protect rape victims from excessive cross-examination, thereby encouraging them to report the abuse. . . . [and to] preserve the integrity of trials. . . . [b]y ensuring that juries will not base their verdicts on prejudice against the victim . . . .'" *State v. Cuni*, 159 N.J. 584, 597 (1999) (quoting *State v. Budis*, 125 N.J. 519, 529 (1991) (citations omitted)). The critical issue raised in this aggravated sexual assault case is whether the Rape Shield Law permits a defendant to introduce evidence of alleged flirtatious conduct by an alleged rape victim towards the defendant, most of which occurred more than a year prior to the alleged rape, to prove that the victim consented to the sexual conduct charged in the indictment. The Court today holds that a defendant can present evidence that the victim flirted with him several weeks, months, or even years before the intimate sexual conduct charged in the indictment occurred. Because I believe the Court's decision today is retrogressive and violative of the Rape Shield Law, I must dissent, not because I condone the victim's alleged flirtations, but because I wish to implement the Legislature's intent of preventing victims from being victimized twice: first by the defendant and second by the judicial system.

I.

A.

The Confrontation Clauses of the Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution guarantee the right of an accused in a criminal case to be confronted with the witnesses against him or her, including the right to a meaningful cross-examination. Limits, however, may be placed on that

right "to accommodate other legitimate interests in the criminal trial process." *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S. Ct. 1038, 1046, 35 L. Ed.2d 297, 308 (1973). Our Rape Shield Law is an illustration of such a compromise, the constitutionality of which has been decided already.

Our Rape Shield Law was first adopted in this State by L. 1976, c. 71, effective August 26, 1976, and codified at *N.J.S.A.* 2A:84A-32.1 to -32.3. Prior to enactment of that statute, the common law of this State permitted a defendant to introduce evidence of the rape victim's general reputation for chastity to support a defense of consent to rape. *State v. Rubertone*, 89 N.J.L. 285, 287 (E. & A. 1916); *O'Blenis v. State*, 47 N.J.L. 279, 279-80 (Sup. Ct. 1885); *State v. Holmes*, 157 N.J. Super. 37, 39 (App. Div. 1978); *State v. Steele*, 92 N.J. Super. 498, 504 (App. Div. 1966). That medieval approach to the trial of a rape case permitted the jury to infer a character trait of immorality that made the sexual encounter more likely to have been by consent. *State v. Budis, supra*, 125 N.J. at 528-29. The purposes of the Rape Shield Law here in New Jersey and across the country have been "to protect rape victims from excessive cross-examination" and to "preserve the integrity of trials." *Id.* at 529. Of the fifty state Rape Shield Laws,[1] New Jersey

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[1] For a list of current Rape Shield Statutes and case law, see Tracey A. Berry, Comment, *Prior Untruthful Allegations Under Wisconsin's Rape Shield Law: Will Those Words Come Back to Haunt You?*, 2002 Wis. L.Rev. 1237, 1247 nn. 57-58 (2002):

Ala. R. Evid. 412; *Alaska Stat.* § 12.45.045 (Michie 2000); *Ark.Code Ann.* § 16-42-101 (Michie 1999); *Cal. Evid.Code* §§ 782, 1103 (West Supp.2002); *Colo.Rev.Stat. Ann.* § 18-3-407 (1999); *Conn. Gen.Stat.* §

(continued...)

and Wyoming have the strongest.

Our 1976 Rape Shield Law was essentially reenacted with the passage of the New Jersey Code of Criminal Justice in 1979 (Code) and codified at *N.J.S.A.* 2C:14-7. L. 1978, c. 95, § 2C:14-7. The Code provides that "[t]he provisions of the [C]ode not inconsistent with those of prior laws shall be construed as a continuation of such laws." *N.J.S.A.* 2C:1-1e.

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[1](...continued)
54-86f (2001), *Conn.Code Evid.* § 4[-]11 (2001); *Del.Code Ann.* tit. 11, §§ 3508-09 (1995 & Supp.2000); *Fla. Stat.* ch. 794.022 (2002); *Ga.Code Ann.* § 24-2-3 (1995); *Haw. R. Evid.* 412; *Idaho Code* § 18-6105 (Michie 1997); 725 *Ill. Comp. Stat.* 5/115-7 (Supp.2002); *Ind.Code* § 35-37-4-4 (1998); *Iowa R. Evid.* 5.412; *Kan. Stat. Ann.* § 21-3525 (1995); *Ky. R. Evid.* 412; *La.Code Evid. Ann.* art. 412 (West 1995); *Me. R. Evid.* 412; *Md.Code Ann.* art. 27, § 461A (2001); *Mass. Gen. Laws* ch. 233, § 21B (2000); *Mich. Comp. Laws* § 750.520j (1991); *Minn. R. Evid.* 412; *Miss. R. Evid.* 412; *Mo.Rev.Stat.* § 491.015 (2001); *Mont.Code Ann.* § 45-5-511 (2001); *Neb.Rev.Stat.* § 28-321 (1995); *Nev.Rev.Stat.* 48.069, 50.090 (2002); *N.H. R. Evid.* 412; *N.J. Stat. Ann.* § 2C:14-7 (West Supp.2002); *N.M. Stat. Ann.* § 30-9-16 (Michie 1994); *N.Y.Crim. Pro. Law* § 60.42, (McKinney 1992); *N.C. Gen.Stat.* § 8C-1, R. 412 (2001); *N.D. R. Evid.* 412; *Ohio Rev.Code Ann.* §§ 2907.02, 2907.05 (Anderson 2002); *Okla. Stat.* tit. 12, § 2412 (Supp.2002); *Or.Rev.Stat.* § 40.210 (2001), Or. Evid.Code R. 412; 18 *Pa. Cons.Stat.* § 3104 (2000); *R.I. Gen. Laws* § 11-37-13 (2000); *S.C.Code Ann.* § 16-3-659.1 (Law. Co-op 1985 & Supp.2001); *S.D. Codified Laws* § 23A-22-15 (Michie 1998); *Tenn. R. Evid.* 412; *Tex.R. Evid.* 412; *Utah R. Evid.* 412; *Vt. Stat. Ann.* tit. 13, § 3255 (1998); *Va.Code Ann.* § 18.2-67.7 (Michie 1996); *Wash. Rev.Code* § 9A.44.020 (2000); *W. Va.Code Ann.* § 61-8B-11 (Michie 2000); *Wis. Stat.* § 972.11; *Wyo. Stat. Ann.* § 6-2-312 (Michie 2001).

The Maryland statute was changed recently. *Md.Code Ann.*, Crim. § 3-319, amended by 2003 *Md. Laws ch.* 89 (S.B.453). Arizona has also adopted a Rape Shield statute, *Ariz.Rev.Stat.* § 13-1421 (West 2003).

Both statutes provide that when a defendant charged with an aggravated sexual assault, or one of a number of other sexual offenses, wishes to introduce evidence during trial of the victim's previous sexual conduct, prior court approval is necessary. A New Jersey Rules of Evidence 104 hearing is required to determine the admissibility of such evidence. *N.J.S.A.* 2A:84A-32.1; *N.J.S.A.* 2C:14-7a. After the trial court first determines whether the evidence is relevant and highly material, it must then engage in a balancing process to determine whether the "probative value of the evidence offered . . . outweighs its collateral nature or the probability that its admission will create undue prejudice, confusion of the issues, or unwarranted invasion of the privacy of the victim . . . ." *N.J.S.A.* 2C:14-7a; see *N.J.S.A.* 2A:84A-32.1. When evidence of the victim's prior sexual conduct that is sought to be introduced by a defendant occurred more than one year prior to the date of the sexual offense charged in the indictment, the defendant must establish by clear and convincing evidence that such evidence is relevant and probative, and that the balancing process will result in a finding that the probative value of that evidence clearly and convincingly exceeds the statutory negative factors listed in *N.J.S.A:* 2C:14-7a. See Biunno, *Current N.J. Rules of Evidence*, comment 6 on *N.J.R.E.* 101(b)(1) at 102 (2003). Otherwise, a statutorily created presumption of inadmissibility is to be deemed unrebutted. *N.J.S.A.* 2C:14-7b and *N.J.S.A.* 2A:84A-32.2.

Prior to 1994, neither of the two statutory provisions contained a standard for determining whether the victim's prior sexual conduct was relevant or probative. Following the 1992-93 Glen Ridge sexual assault trial in Essex County in which the defense was allowed to introduce graphic evidence of the victim's sexual history, *State v. Scherzer*, 301 N.J. Super. 363, 392, 413-14 (App. Div.), certif. denied, 151 N.J.

466 (1997), the Rape Shield Law was strengthened to protect victims' privacy. Assembly Judiciary, Law and Public Safety Committee, *Statement to Assembly Bill No. 677-L.* 1994, c. 95, at 1 (Jan. 20, 1994) (Assembly Statement). The 1994 amendments were intended to "place[] [additional] restrictions on a defendant's ability to introduce evidence of the rape victim's past sexual conduct." *Ibid.* Those amendments to the Code's Rape Shield Law, which became effective August 11, 1994, define when the victim's prior sexual conduct is relevant and probative:

> Evidence of the victim's previous sexual conduct with the defendant shall be considered relevant if it is probative of whether a reasonable person, knowing what the defendant knew at the time of the alleged offense, would have believed that the alleged victim freely and affirmatively permitted the sexual behavior complained of.

[*N.J.S.A.* 2C:14-7d.]

The 1994 amendments also modified *N.J.S.A.* 2C:14-7a, which now provides that evidence of a victim's past sexual conduct is inadmissible unless it is "relevant and highly material and . . . [its] probative value . . . substantially outweighs its collateral nature or the probability that its admission will create undue prejudice, confusion of the issues, or unwarranted invasion of the privacy of the victim." *N.J.S.A.* 2C:14-7a (emphasis added). Finally, the Code's version of the Rape Shield Law defines the victim's "sexual conduct" to mean "any conduct or behavior relating to sexual activities of the victim, including but not limited to previous or subsequent experience of sexual penetration or sexual contact, use of contraceptives, sexual activities reflected in

gynecological records, living arrangement and life style." *N.J.S.A.* 2C:14-7e, subsequently renumbered as f. *L.* 1995, *c.* 237, §1.

In amending the Code's version of the Rape Shield Law, the Legislature clearly intended to protect victims of sexual assault to the maximum extent permissible under the state and federal constitutions. The legislative history in respect of the 1994 amendments provides:

> It is vitally important to assure rape victims that they will not themselves be put on trial if they press charges against their attackers. This bill is intended to strike an appropriate balance between protecting a defendant's constitutional rights, and protecting a rape victim from an assault upon the victim's character. It is in the public interest to protect the privacy of the victim, as opposed to allowing the defendant to freely examine the victim's past when the examination serves no material or relevant evidentiary or constitutional purpose.

[*Assembly Statement, supra*, at 1.]

The Legislature intended to assure victims of sexual assault that if they took the courageous step of reporting the crime and confronting their attacker at trial, the State would endeavor to protect them from further humiliation in court. The legislative history reflects the Legislature's judgment that the sexual history of rape victims often "serves no material or relevant evidentiary or constitutional purpose," and that judges should be especially vigilant when a defendant wishes to present such evidence. *Ibid.*

Defendant and many others similarly charged have frequently challenged the application of Rape Shield Laws by arguing that the laws deprive them of their constitutional rights of confrontation, compulsory process, and due process. *See, e.g., State v. G.S.*, 278 N.J. Super. 151, 170 (App. Div. 1994), rev'd on other grounds, 145 N.J. 460 (1996); *State v. Ryan*, 157 N.J. Super. 121, 124 (App. Div. 1978). In *State v. Budis, supra*, 125 N.J. at 530-32, we upheld the constitutionality of New Jersey's Rape Shield Law as it existed prior to the 1994 amendments. We noted that the United States Supreme Court has endeavored to maintain a balance between upholding defendants' "fundamental" rights, such as confrontation and cross-examination, and permitting trial courts to "'retain wide latitude . . . to impose reasonable limits on . . . cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" *Id.* at 532 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S. Ct 1431, 1435, 89 L. Ed.2d 674, 683 (1986)).

B.

I would not adopt the amorphous "continuing course of conduct" standard used by the Court today to determine when our Rape Shield Law should preclude a defendant from introducing evidence with respect to a victim's prior sexual conduct. Based on the legislative history and the 1994 amendments to our Rape Shield Law, and because our original Rape Shield Law is contained within the Rules of Evidence enacted by the Legislature, *N.J.S.A.* 2A:84A-17 to -49, I would instead expand and adopt the balancing process established in *N.J.R.E.* 403, as explicated in *State v. Cofield*, 127 N.J. 328, 338 (1992), for determining when the victim's prior sexual conduct is admissible. That Rule and *N.J.S.A.*

2C:14-7a focus on excluding otherwise relevant evidence based on prejudice, confusion and waste of judicial time. The Rape Shield Law also focuses on unwarranted invasion of privacy of the victim. I would, however, slightly modify the *Cofield* four-part test to reflect the language and intent of our Rape Shield Law. I would adopt the following multi-part test: 1. The proffered evidence must constitute prior sexual conduct of the victim; 2. It must be relevant to, and probative of, one of the issues enumerated in *N.J.S.A.* 2C:14-7c or d; 3. It must be reasonably close in time to the offense charged in the indictment; 4. The highly probative value of that evidence must substantially outweigh its collateral nature, the probability of undue prejudice to the victim in the eyes of the jury, confusion of the issues, or an unwarranted invasion of the victim's privacy; 5. When the proffered evidence predates the date of the charged offense by one year or more, the proffered evidence is presumed to be inadmissible; 6. To overcome that presumption, the defendant must produce clear and convincing proof that such evidence is admissible by tipping the balancing process in his or her favor.

Adoption of the foregoing *Rule* 403 analysis would provide a well established and meaningful approach as compared to the amorphous "continuing course of conduct" standard adopted by the majority. Furthermore, the *N.J.R.E.* 403 analysis has been used consistently to conduct Rape Shield Law balancing. *State v. Scherzer, supra*, 301 N.J. Super. at 413; *State v. G.S., supra*, 278 N.J. *Supra* at 161, 168-69. The exclusion of evidence after a proper *Rule* 403 analysis "is reversible error only if it is critical to the defense, as where there was no other available evidence to" support defenses raised. *State v. Scherzer, supra*, 301 N.J. Super. at 414. The evidence excluded by the trial court in this case was not critical to the defense. In addition to introducing

evidence in respect of the three instances of prior sexual conduct of J.S., defendant presented other evidence through his testimony to support the defense of consent.

II.

A.

As noted previously, the defense to the charge of aggravated sexual assault was consent to "sexual penetration," thereby admitting that defendant had sexual relations with the victim. The question becomes whose state of mind or conduct must be examined to determine whether the sexual penetration was indeed by consent. The aggravated sexual assault charge filed against defendant, *N.J.S.A.* 2C:14-2a(4), is part of the Code's "provisions covering rape [that] were formulated by a coalition of feminist groups assisted by the National Organization [for] Women (NOW) National Task Force on Rape." *In re M.T.S.*, 129 N.J. 422, 440 (1992). The stated purpose of the Code's rape provisions was "to remove all features [in the Model Penal Code's approach to rape] found to be contrary to the interests of the rape victims." *Ibid.* Because the Code's definitions in respect of sexual assaults "make[] no reference to the victim's state of mind or attitude, or conduct in response to the assault[,]" *id.* at 441, "do[] not refer to force in relation to 'overcoming the will' of the victim, or to the 'physical overpowering' of the victim, [and because the] "constituent elements . . . focus exclusively on the forceful or assaultive conduct of the defendant[,]" *id.* at 442, "the victim . . . is [not] required to resist and therefore need not have said or done anything in order for the sexual penetration to be unlawful." *Id.* at 443. Therefore, "[w]hen a defendant claims that he penetrated with permission, he puts his own state of mind in issue . . . ." *State v. Oliver*, 133 N.J. 141, 155 (1993). The focus is not on the victim's state of mind; it is instead on defendant's

actions "and on the reasonableness of the defendant's alleged belief that the victim has given [affirmative] permission," *id.* at 156, "to the specific act of sexual penetration." *M.T.S., supra*, 129 N.J. at 447-48. That affirmative consent standard protects women from acquaintance rape while at the same time "promot[ing] equal responsibility by men and women in all sexual encounters." Kathleen F. Cairney, Note, *Addressing Acquaintance Rape: The New Direction of the Rape Law Reform Movement,* 69 St. John's L. Rev. 291, 317 (1995).

This Court's decision in *M.T.S.* substantially influenced the 1994 amendments to our Rape Shield Law. *Assembly Statement, supra*, at 2. Both the Code's provisions with respect to rape and the Rape Shield Law were intended to protect rape victims while defining the permissible restrictions on a defendant's attempts to demonstrate the reasonableness of the defendant's alleged belief that the victim has given affirmative permission to the specific act of sexual penetration charged in the indictment.

B.

Here, the trial court conducted a hearing pursuant to *N.J.S.A.* 2C:14-7a to determine what if any of J.S.'s "previous sexual conduct" would be admissible. The court appears to have decided the admissibility of prior sexual conduct evidence using a blend of the current standard and the less restrictive, pre-1994 Budis test, stating, "[w]hen applying the Rape Shield Statute a court must 'review [. . .] whether the evidence [is] relevant and highly material to the defense and whether its probative value outweighs its prejudicial effect.' *State v. Clowney*, 299 N.J. Super. 1, 15 [(App. Div.), certif. denied, 151 N.J. 77 (1997)], citing *State v. Budis*, 125 N.J. 519, 532 (1991)." After evaluating defendant's proffered evidence for its probative value, the

court found that most of it was not probative within the meaning of *N.J.S.A.* 2C:14-7d, thus making the use of any balancing test largely unnecessary.

The trial court categorized all of defendant's evidence of his and J.S.'s prior relationship as follows: 1) That J.S. has on unspecified occasions asked the defendant to drive her to work when she was employed by the Cumberland County Prosecutor's Office; 2) That J.S., on unspecified occasions while working at the [Prosecutor's Office], flirted with the defendant by touching him, hugging him and brushing up against him; 3) That while J.S. worked at the [Prosecutor's Office] she made statements to the defendant that she was "gonna get that man" and that she "needed a man like that" and that the defendant was "too good" for his wife; 4) That while J.S. worked at the [Prosecutor's Office] she grabbed the defendant's buttocks; 5) That on the last day that J.S. worked for the [Prosecutor's Office] in March of 1997, she forced herself on the defendant and kissed him in a provocative manner; 6) That after J.S. had stopped working for the [Prosecutor's Office], she approached the defendant while he was on the front porch of the Prosecutor's Office and stated that she was ready to have an affair with the defendant now that she no longer had to see the defendant's wife every day; 7) That on an occasion in 1998 when J.S. met with the defendant at the Bridgeton Police Department to take care of a motor vehicle warrant, J.S. forced herself on the defendant and kissed him in a provocative manner; 8) That during the sexual assault at issue in this case, the victim forced herself on the defendant and kissed him in a provocative manner.

I agree with the trial court that most of the proffered evidence is "not probative of whether a reasonable person would have believed that J.S. freely and affirmatively consented to the sexual conduct on September 28, 1998."

Application of the *N.J.R.E.* 403 balancing test leads me to conclude that the trial court properly balanced the appropriate factors and concluded that the excluded evidence has little appreciable probative value that is far outweighed by its potential to mislead and prejudice the jury. Two of defendant's proposed witnesses, Wendy Frost and Terri Seay, were not permitted to testify at all. The trial court and the Appellate Division majority properly concluded that their testimony had nothing to do with whether J.S. consented to the sexual encounter with defendant on September 28, 1998.

Frost testified that whenever J.S. encountered defendant visiting his wife at the Prosecutor's Office, she would run to him, stand close to him and touch his arm or shoulder. Frost also described J.S.'s remarks to defendant, that were made in front of Stephanie Garron: "if your wife's never around let me know[;]" "I can take care of you[;]" "[I] would have no problems going to see [defendant] while Stephanie was away." Seay's testimony was similar: that she saw J.S. brush "her breast area" against defendant, that J.S. frequently hugged him, touched his arm and started flirtatious conversations with him, and that J.S. expressed "how lucky" Stephanie was and that she could flirt with defendant after she ceased working with his wife. Viewed in the abstract, those alleged remarks may make it seem plausible that J.S. wanted to engage in sexual activity with defendant. However, neither Frost nor Seay could provide approximate dates for when any of that behavior occurred (save the remarks made on J.S.'s last day of work in March 1997). In any event, none of their testimony involved events occurring later than March 1997, and they could date back as far as 1992, when J.S. began working at the Prosecutor's Office. Absent a more specific

date, the testimony of Wendy Frost and Terri Seay is not probative of whether J.S. consented to engage in sexual activity with defendant on September 28, 1998. Their testimony refers to events that took place sometime between *eighteen months and six years* before the night in question. The Legislature recognized the scant value of such stale evidence when it provided in the Rape Shield Law that "[i]n the absence of clear and convincing proof to the contrary, evidence of the victim's sexual conduct occurring more than one year before the date of the offense charged is presumed to be inadmissible . . . ." *N.J.S.A.* 2C:14-7b. That presumption was not rebutted.

Much of the additional excluded evidence suffers from the same defect: it is far too attenuated in time to have any significant probative value. Stephanie Garron testified at the Rape Shield hearing that J.S. openly touched and hugged her husband and held his hand when J.S. saw him at the Prosecutor's office, and that "the more people that were around the more of a production it became to grab him and hug him." She described "outrageous" remarks made by J.S. ("what do you want with that scrawny white girl[;]" "is that your gun or are you happy to see me[;]" "I'll take that man away from you if he spends just one night with me"), but Stephanie also stated that these remarks were made "for impact. . . . to get to me." Stephanie was permitted to testify at trial that she had confronted J.S. after hearing that J.S. touched her husband's buttocks, and also described the circumstances surrounding J.S. and defendant's "goodbye kiss" on J.S.'s last day of work. All of those incidents took place in or before March 1997. Stephanie was barred from describing only one incident relating to her husband that occurred later, "probably in [19]98," when another Prosecutor's Office employee told Stephanie that "[J.S.] says that she's going to have an affair with your husband now that

she doesn't have to look at you every day." That last alleged incident was inadmissible hearsay, N.J.R.E. 801(c); *State v. Long*, 173 N.J. 138, 152 (2002). Nor was it evidence of the "victim's previous sexual conduct" within the meaning of the Rape Shield statute. The majority includes in its list of excluded evidence additional remarks J.S. made to Stephanie in September 1998. However, it defies reason to claim that those innocuous statements, made to a friend ("she needed to find a way not to work anymore" and "to find me a man"), show intent to perform fellatio on the friend's husband in the near future.

Defendant also testified at the Rape Shield hearing with respect to J.S.'s prior flirtations toward him both inside and outside her workplace. He testified that whenever he saw J.S. at the Prosecutor's Office, she would "make a big production" of hugging him, and brushing "her chest area and . . . her butt area" against him. Defendant described flirtatious remarks J.S. made to him, such as "she would like to have a white man like me. . . . I spoiled my wife . . . I was too good to my wife . . . I needed somebody like her . . . my wife didn't treat me right." Defendant also testified that in or around July 1998, he happened to see J.S. visiting the Prosecutor's Office and asked her if she was ready to have an affair, and she responded "now that I don't have to look at your wife anymore, you're damn right." Defendant invited J.S. to call him. However, she did not accept his offer to call and there was no further contact between them until the early morning of September 28, 1998. The only time J.S. ever initiated contact with defendant away from the Prosecutor's Office was when she called him to help her dispose of the warrant in July 1998, but that occurred only after he visited her home more than once to offer his assistance. A reasonable person would not infer that because J.S. touched and spoke to defendant in a flirtatious manner when she happened to see

him, she was agreeing to have defendant to come to her home at 3:30 a.m., a year or more later, to engage in fellatio. Only one of the excluded incidents of flirtatious conduct described by defendant at the Rape Shield hearing took place within a year of the alleged assault: their meeting on the porch in or about July 1998, when J.S. purportedly expressed her interest in having an affair with defendant. Even if such a remark could be probative of affirmative consent to sex two months in the future, and I submit that it is not, its exclusion was harmless error. As the Appellate Division majority noted, the jury was aware of three prior incidents when J.S. allegedly kissed or touched defendant in a sexual way. The omission of this one statement, which was not followed by any affair-like behavior between J.S. and defendant before September 28, 1998, was not "clearly capable of producing an unjust result." R. 2:10-2.

Defendant was permitted to testify at trial in respect of those three acts of "prior sexual conduct" between himself and J.S. Although they satisfy the "prior sexual conduct" requirement, they were of miniscule or no probative value. J.S.'s grabbing of defendant's buttocks, and their "passionate" kisses occurring in March 1997 and July 1998 do not indicate to a reasonable person that J.S. consented to perform fellatio on defendant on September 28, 1998. Nonetheless, those episodes and other evidence were placed before the jury allegedly to support the consent defense. Because of the substantial quantity of evidence heard by the jury with respect to the defense of consensual penetration, there was no violation of defendant's right of confrontation, cross-examination or compulsory process. Hence, the excluded evidence was merely cumulative and not critical to the defense. *State v. Scherzer, supra*, 301 N.J. Super. at 414-16.

III.

Defendant has seized on the trial court's remark that the three incidents of prior sexual conduct that were admitted "show[] a continuing course of conduct on the part of J.S. to engage in sexual conduct with the defendant," and uses that remark to justify his assertion that all of the excluded evidence of J.S.'s alleged flirtation with defendant should have been admitted to fully demonstrate a "continuing course of conduct." However, Rape Shield cases must be analyzed on a case-by-case basis, and in this case the amount of time that passed between the vast majority of J.S.'s alleged flirtation with defendant and the incident complained of lead me to conclude that the prejudicial effect of the excluded evidence far outweighs its miniscule (if any) probative value. In my view, the majority has ordered the admission of excluded evidence based on the erroneous assumption "that cross-examination [of the prosecutrix on that irrelevant evidence] has some mysterious virtue of its own which imparts merit to facts otherwise worthless." 3A *Wigmore on Evidence*, § 878, at 648 (Chadbourn rev. 1970).

"Prejudice," in the context of the Rape Shield Law, includes concerns both for victims of sexual assault and for the integrity of jury trials. *State v. Cuni, supra*, 159 N.J. at 597. The Legislature was concerned that placing the sexual history of rape victims before a jury would needlessly humiliate them at trial, thereby subjecting them to further abuse while simultaneously discouraging other victims of sexual abuse from reporting the sexual assault. Under common law, women deemed "unchaste" could have their pasts used against them as evidence that they were likelier to consent to sex no matter what the circumstances, and the modern Rape Shield Law eliminates that false presumption. "General bad character for chastity of the person alleged to

have been injured may be given by the defendant, as a fact throwing doubt on her statement that the connection was against her will." *O'Blenis v. State*, supra, 47 N.J.L. at 280. In this case, the excluded evidence does not include intimate details of J.S.'s private life and does not tend to portray her as "unchaste." *Ante* at 36-37. Indeed, the relatively innocuous nature of the excluded evidence indicates its low probative value. However, at defendant's new trial J.S. will nonetheless be cross-examined regarding every aspect of the behavior that even defendant's wife viewed mostly "in a lighthearted way" as it occurred. J.S.'s feeling of being placed under the microscope will not be lessened by the fact that the subject of the questioning did not involve explicit conduct. Moreover, future victims of acquaintance rape might well be less likely to come forward now that they will be under suspicion themselves if they have ever engaged in a flirtation with their subsequent attacker, no matter how innocent it was, no matter how long ago.

Furthermore, the impact the excluded evidence will have on a jury cannot be ignored.[2] The jury will be bombarded with testimony that J.S. rubbed her body against defendant, showered him with attention, and made provocative remarks, mostly between six years and eighteen months prior to the alleged assault. It will be difficult if not impossible for the State to overcome the inference that this testimony will create in the minds of jurors, that J.S. was "asking for it." Under the Court's holding today, it will be virtually impossible for a woman to prove that she was raped

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[2] See Clifford S. Fishman, *Consent, Credibility, and the Constitution: Evidence Relating to a Sex Offense Complainant's Past Sexual Behavior*, 44 Cath. U.L.Rev. 709, 725 (1995) (noting that usual "prejudice" analysis applies only to the parties, not to crime victims).

by a man whom she had previously expressed interest in, flirted with, or dated, even if she never engaged in sex with him prior to the assault occurred. Today's decision essentially restricts our Rape Shield Law to sexual assaults between victim and violent stranger, which translates into about fifteen percent of rapes. Cairney, *supra*, 69 St. John's L. Rev. at 296. That is a result never intended by the Legislature nor constitutionally mandated.

I agree with the Supreme Court of Montana that although evidence of recent sexual intimacy between a victim and a defendant would be admissible, evidence that a victim pulled a defendant onto her lap two days before an alleged assault was not, because

> flirtatious behavior is not, contrary to [the defendant's] opinion, an invitation to engage in sexual relations. An examination into the nuances of the victim's interactions with the defendant days before an alleged rape would effectively put the victim on trial. Not only is this evidence irrelevant to the issue of consent, it is precisely the harm that the rape shield statute is designed to prevent."

[*State v. Detonancour*, 34 P.3d 487, 491 (Mont. 2001).]

I also agree with the Montana Supreme Court that such flirtatious conduct does not even constitute sexual conduct under the Rape Shield Law and is not probative of whether a victim consented forty-eight hours later. *Ibid.* In contrast, this Court today allows the defense to scrutinize the victim's flirtatious behavior, not merely days before the incident, but weeks, months, or even years before. Such an archaic approach to rape flies in the face of the Legislature's purposes

in enacting the Rape Shield Law.

IV.

I also disagree with the Court's implied holding that a new trial is required because the court failed to instruct the jury on the lesser-included offenses of sexual assault and criminal sexual contact. Although the majority declines expressly to rule on whether it was reversible error for the trial court to refrain from charging the lesser-included offenses at defendant's request, its endorsement of Chief Justice Wilentz's dictum in *State v. Powell*, 84 N.J. 305, 318-19 (1980), leads me to believe that the Court would have reversed had this been the sole issue in the case. I agree that, in the future, lesser-included offenses must be charged despite a defendant's request to the contrary as long as "the facts 'clearly indicate' the appropriateness of that charge" and unless such a charge would result in surprise or severely prejudice the defense. *State v. Choice*, 98 N.J. 295, 299, 300 (1985); *State v. Perry*, 124 N.J. 128, 162-63 (1991). What I cannot endorse is the notion that a defendant who invites error by making a strategic choice to request an all-or-nothing jury charge can obtain a new trial when his or her gamble backfires. This Court has traditionally given great deference to defendants' trial strategies. *State v. Perry, supra*, 124 N.J. at 162 ("Trial courts must carefully refrain from preempting defense counsel's strategic and tactical decisions and possibly prejudicing defendant's chance of acquittal.") However, deference to defense counsel does not require an appellate court to find plain error based on that strategic choice. *State v. Harper*, 128 N.J. Super. 270, 277 (App. Div.) ("'The defendant cannot beseech and request the trial court to take a course of action, and upon adoption by the court, take his chance on the outcome of the trial, and if unfavorable, then condemn the very procedure he sought and urged, claiming

it to be error and prejudicial.'") (citations omitted), certif. denied, 65 N.J. 574 (1974). The trial court's omission of the lesser-included offense charge did not "cut mortally into the substantive rights of [defendant]" because it "did not demonstrably impair [his] ability to maintain a defense on the merits." *Ibid.* Rather, it was a tactical decision, made by the defense counsel in light of the defense of affirmative consent to sexual penetration. A charge of sexual assault or criminal sexual contact would have been inconsistent with the consent defense. I would not reverse based on defense counsel's strategic choice.

V.

I would affirm the judgment of the Appellate Division.

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION
SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2279-00T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANDERSON GARRON,

Defendant-Appellant.

Argued May 22, 2002 - Decided - July 9, 2002

Before Judges King, Wecker and Winkelstein.

On appeal from Superior Court of New Jersey, Law Division, Cumberland County, 99-7-134-S.

Edwin J. Jacobs, Jr., argued the cause for appellant (*Jacobs & Barbone*, attorneys; *Mr. Jacobs*, of counsel; *Joseph A. Levin*, on the brief).

Paul H. Heinzel, Deputy Attorney General, argued the cause for respondent (*David Samson*, Attorney General, attorney; *Melaney S. Payne*, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Following a jury trial, defendant Anderson Garron appeals from his convictions of aggravated sexual assault, aggravated criminal sexual contact and official misconduct. He was sentenced to eleven years, with a three and two-

thirds year period of parole ineligibility pursuant to the Graves Act, *N.J.S.A.* 2C:43-6(c). The court also imposed an eighty-five percent period of parole ineligibility pursuant to the No Early Release Act, *N.J.S.A.* 2C:43-7.2 (NERA). As a result of his convictions for aggravated sexual assault and aggravated criminal sexual contact, he was subjected to sentencing under Megan's Law, *N.J.S.A.* 2C:7-1 to -19.

On appeal, defendant raises the following points:

POINT I:

THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND DEPRIVED DEFENDANT OF HIS RIGHT TO DUE PROCESS OF LAW BY FAILING TO CHARGE THE JURY AS TO THE LESSER-INCLUDED OFFENSES OF SEXUAL ASSAULT AND CRIMINAL SEXUAL CONTACT WHEN THE EVIDENCE "CLEARLY INDICATED" A RATIONAL BASIS FOR SUCH LESSER-INCLUDED OFFENSES.

POINT II:

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY RULING THAT NERA WAS APPLICABLE IN THE PRESENT CASE DESPITE THE FACT THAT THE STATE FAILED TO COMPLY WITH THE SPECIFIC, PLAIN LANGUAGE OF THE STATUTE REQUIRING THAT DEFENDANT BE SERVED WITH NOTICE TO IMPOSE A NERA SENTENCE WITHIN FOURTEEN DAYS OF RETURN OF THE VERDICT.

POINT III:

THE TRIAL COURT'S EXCLUSION UNDER *N.J.S.A.* 2C:14-7 (THE RAPE SHIELD STATUTE) OF RELEVANT AND HIGHLY MATERIAL EVIDENCE DENIED DEFENDANT HIS RIGHT TO CROSS-

EXAMINE AND CONFRONT WITNESSES AGAINST HIM, TO COMPULSORY PROCESS, AND TO DUE PROCESS OF LAW UNDER THE UNITED STATES CONSTITUTION'S SIXTH AND FOURTEENTH AMENDMENTS AND THE NEW JERSEY CONSTITUTION'S ARTICLE I, PARAGRAPH 10 AND, AS SUCH, CONSTITUTED REVERSIBLE ERROR.

POINT IV:

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING THE DETAILED TESTIMONY OF SHEILA HENRY AS AN EXCITED UTTERANCE BECAUSE THE COMPLAINANT CLEARLY HAD AN OPPORTUNITY TO DELIBERATE AND FABRICATE DURING THE EIGHT HOUR TIME PERIOD BETWEEN INCIDENT AND COMPLAINT.

THE TRIAL COURT ALSO COMMITTED REVERSIBLE ERROR BY ADMITTING THE SAME TESTIMONY AS FRESH COMPLAINT EVIDENCE WHEN SHEILA HENRY WAS NOT A NATURAL CONFIDANTE OF COMPLAINANT.

POINT V:

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN REFUSING TO REVIEW AND COMPEL THE PRODUCTION OF THE COMPLAINANT'S PERSONNEL AND EMPLOYMENT RECORDS, AS THE PRODUCTION OF SUCH RECORDS WAS RELEVANT AND NECESSARY TO EFFECTUATE DEFENDANT'S SIXTH AMENDMENT RIGHT TO CROSS-EXAMINE AND CONFRONT WITNESSES AGAINST HIM.

POINT VI:

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY DENYING DEFENDANT'S MOTION FOR RECUSAL.

POINT VII:

DEFENDANT WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, PARAGRAPH 10 OF THE NEW JERSEY CONSTITUTION, WHICH REQUIRES THE GRANT OF A NEW TRIAL OR, IN THE ALTERNATIVE, A REMAND FOR POST-CONVICTION RELIEF PROCEEDINGS PURSUANT TO *R.* 2:9-1.

The State has raised an additional issue on appeal -- whether the judgment of conviction must be amended to reflect a mandatory forfeiture of public office and debarment of future public employment or position because defendant was convicted of second-degree official misconduct which involved or touched upon his office.

We have reviewed the record in light of these contentions and the applicable law. We find no merit to defendant's arguments and affirm defendant's judgment of conviction. We also agree with the State that the judgment of conviction needs to be amended to reflect the mandatory forfeiture of public office and we remand to the trial court for that purpose.

I

On July 27, 1999 a state grand jury returned an indictment (99-07-00134-S) charging Garron with first-degree aggravated sexual assault, in violation of *N.J.S.A.*

2C:14-2a(4); third-degree aggravated criminal sexual contact, in violation of *N.J.S.A.* 2C:14c-3a; and second-degree official misconduct, in violation of *N.J.S.A.* 2C:30 - 2a. On March 10, 2000 Judge Ridgway denied a motion requesting disclosure of the victim's (J.S.) employment history and personnel records. On June 12 and 15, 2000 Judge Ridgway conducted a hearing on the admissibility of evidence pursuant to the Rape Shield statute, *N.J.S.A.* 2C:14-7. Also at that time, Judge Ridgway denied a motion by defendant for his recusal. In a written opinion dated July 19, 2000, Judge Ridgway partially granted Garron's motion to admit evidence of certain prior sexual contact Garron had with J.S. He precluded evidence which he characterized as "flirtatious" between defendant and J.S., finding the conduct was "taken lightly" by Garron, his wife Stephanie, and J.S., and was not "probative of whether a reasonable person would have believed that J.S. freely and affirmatively consented to the sexual contact on September 28, 1998."

On July 21, 2000, a hearing pursuant to *N.J.R.E.* 104 was held to determine the admissibility of statements by Sheila Henry and Robin Light, two of J.S.'s co-workers. On August 8, 2000, Judge Ridgway ruled, in a written opinion, that Henry's statements were admissible under *N.J.R.E.* 803(c)(2), the excited utterance exception to the hearsay rule; he also allowed the introduction of her statements under the fresh complaint doctrine. He precluded Light's statements.

The remaining pre-trial issues were addressed by the court on August 15, 2000. The judge postponed the question of whether to charge lesser-included offenses until the charge conference at trial.

II

The case was tried before Judge Ridgway and a jury on August 22, 23, 24 and 28, 2000. The following evidence was produced at trial. Garron was a Bridgeton Police Officer. J.S. met Garron while she worked as a secretary in the Victim Witness Unit of the Cumberland County Prosecutor's Office. Stephanie Garron was a detective at the Prosecutor's Office and Garron frequently visited her there. J.S. testified that she had a "friendly" relationship with Garron and Stephanie, but did not socialize with them outside of the workplace.

On the day of the sexual assault, September 28, 1998, J.S. had been employed as a communications operator at Southern State Prison for about a year-and-a-half. The assault occurred at approximately 3:30 a.m. J.S. testified that she woke around 2:30 a.m. to prepare for her 4:30 a.m. shift. She turned on her light, which was visible from the roadway. Garron was on duty -- his shift was from 9 p.m. on September 27 through 7 a.m. on September 28. The events leading up to the sexual encounter were described by both Garron and J.S. at trial.

Garron testified he drove past J.S.'s house, which was located outside of Garron's patrol area, in a marked police car around 3:30 a.m. As he drove by, he noticed the interior light was on in J.S.'s car. He parked his patrol car behind J.S.'s car to check whether her car had been tampered with. He beamed a spotlight on J.S.'s car, then got out of his car and shined his flashlight on the ignition cylinder. He found no damage. He did not radio to the dispatcher his suspicion that a break-in had occurred. He walked to the partially-open back door of J.S.'s house and entered the laundry room. He knocked on the door leading

to the dining room. When J.S. heard the knock she asked who it was, and Garron replied "It's the police." J.S. then went downstairs, thinking her car might have been stolen, and saw Garron standing at the dining room door. Garron told J.S. her car's interior light was on. She told Garron her son occasionally listens to the car radio at night and may have left the light on. J.S. went back upstairs for the car keys, and when she returned, she and Garron walked outside to her car. They examined the car and found no damage. As Garron and J.S. walked back to her house, he told her she should not leave the laundry room door open. J.S. testified that Garron entered the laundry room uninvited and asked her, "Don't I get a hug for this?" She gave Garron a hug and thanked him. J.S. testified that Garron then wrapped his arms around J.S. and tried to kiss her. J.S. tried to push him back, but Garron "kept trying to put his mouth on mine." J.S. testified that she repeatedly and firmly told Garron, "I don't want to do this. I know your wife. I know Stephanie. And I cannot do this." She testified that Garron said, "'look' -- and he looked me dead in my face and he said, 'Look, I want to see what I [have] been missing all this time.'"

According to J.S., Garron then pushed her down to her knees. She resisted and pleaded with him to stop. He continued to push her down using one hand, as he unzipped his pants with the other hand. According to her testimony, Garron exposed his penis while J.S. continued her pleas for him to stop. Garron then removed his duty weapon from the holster and laid it within arm's reach on top of a dresser next to him. J.S. testified she thought the gun was ready to be fired because a red laser-like light (the sighting device) shined from the gun barrel to the wall. Fearing for her safety, J.S. submitted.

Garron then "started tapping" J.S.'s lips with his penis and inserted his penis into her mouth. J.S. gagged and tried to stand up. After about a minute, Garron started "breathing hard," and she thought he was going to ejaculate. J.S. tried to stand up, but Garron told her to stay down, grabbed the back of her head, and ejaculated inside her mouth. Throughout the assault, she "kept [her] eye on the gun, making sure it was still in the same spot."

J.S. spit the semen into a washcloth. She testified that Garron "finish[ed] himself off" by masturbating. He pulled up his pants and told J.S., "This is going to be our secret[,] right?" Garron then left J.S.'s house around 3:45 a.m. J.S. rinsed her mouth with rubbing alcohol. J.S. testified that she did not immediately report the rape to the police because she was afraid. She left for work after placing the semen-stained washcloth on top of the dresser in the laundry room.

J.S. testified that although she reported to work, she thought continuously about the assault. Around 7:30 a.m. Henry arrived at work and noticed that J.S. was unusually quiet. Around 11 a.m., Henry asked J.S. to join her for lunch; as they drove, J.S. told her she had been raped that morning. According to Henry, J.S. told her about the assault, explaining "she tried to pull away, but he pushed her head back" until he ejaculated inside her mouth.

Henry testified that as J.S. told her the story she appeared "distant. And that she was just telling me -- like she was still in shock." J.S. told Henry that she had not decided whether to report the rape because she was concerned about Garron's family. J.S. also told Henry she was afraid to contact the police. She feared she might be killed because Garron said the encounter was their "secret."

After J.S. and Henry returned to work, J.S. ran to the restroom crying. Shortly thereafter, Henry went to the restroom and saw J.S. in the corner "rocking, shaking and crying." Henry testified that J.S. repeated that she did not know why Garron "did this to her." After trying to comfort J.S., Henry summoned Light, who found J.S. in a distraught state in the restroom. J.S. then described the rape to Light. The women remained in the restroom for about twenty minutes. Then J.S. drove her car home as Henry followed to ensure she arrived safely.

Henry testified that J.S. hesitated to enter her house because she was still afraid. Henry returned to work and called J.S., who told her she had trouble sleeping because she kept "feeling the pressure of him pushing her down on her shoulders." Later that evening J.S. reported the rape to the police. She also contacted a rape hotline and the Cumberland County Prosecutor's Office.

The next day J.S. met with First Assistant Prosecutor Linda Lawhun, Cumberland County Police Chief James Rocco, and Victim-Witness Coordinator Ashley Sorantino. According to Rocco, J.S. was upset, but able to speak clearly. J.S. told him that Garron assaulted her. She gave Rocco the semen-stained washcloth.

Garron testified that later that evening, while he was off duty, he told his wife that he was going to the store. Instead, he went to the police station and called J.S. Garron asked J.S. if she recognized his voice; when she said she did not, he replied, "It's Andy. I'm hurt that you didn't recognize my voice." Garron then asked J.S. her work schedule. She said, "I got to go. Can you call me back?" Garron said he could not, but left the police station telephone number. J.S. did not return the call; instead she

contacted Rocco and told him Garron had called her.

On September 30, 1998 investigators collected evidence at J.S.'s home. They took pictures and video-taped the scene, interviewed J.S., and took her statement. On October 1, 1998 the police executed a search warrant for Garron's residence. They seized his police uniforms, belts, gun leather, firearms and unlaundered underwear. Garron was arrested for sexually assaulting J.S.

Garron's version of the sexual encounter was starkly different from J.S.'s. At trial, Garron denied forcing J.S. to perform fellatio or masturbating at J.S.'s home. He admitted he drove beyond his patrol area, past J.S.'s house, and that he did not report the suspected break-in of J.S.'s car to the dispatch unit. But he insisted that J.S. initiated the sexual encounter. He told the jury that after he and J.S. had inspected her car, she told him that she and her husband had "split up" and that she had "kicked him out." She then "motioned" for him to "follow her back into the house." According to Garron, J.S. said "you deserve a hug and a kiss for this too." She then hugged and kissed him; he returned the kisses. She began to "rub [his] groin area." He said she then "unzipped my zipper. [She] pulled my penis out . . . then slid down in front of me . . . and began to perform oral sex" on him. Garron admitted that he removed his service pistol during the encounter and placed it on the dresser next to him, but he denied that the sighting device was activated. He testified that when he pulled up his pants after the encounter J.S. whispered to him that now it was her turn. He replied, "I'll have to owe you one," and left.

Garron's defense was consent. To support that defense, Garron testified that prior to the assault J.S.

touched his buttocks while he was visiting the Cumberland County Prosecutor's Office. He also testified J.S. kissed him passionately twice; once when she left the Prosecutor's Office and again when he assisted her to pay a fine. Stephanie Garron's testimony corroborated Garron's account. The parties stipulated that the washcloth contained Garron's sperm.

III

After the jury was excused on August 24, 2000, and after the judge and the attorneys had conferred about the charge in chambers, the charge conference was placed on the record. Both the State and defense counsel agreed with the judge when he stated "There'll be two lesser-included charges which we discussed." Before the attorneys left, they were instructed to fax any additions or corrections to the charge to the court. When court reconvened on August 28, 2000, the judge indicated that he had received and taken into account "your various sundry faxes." The faxes that the judge was referring to were an August 24, 2000 letter from the State, in which it was argued that the judge should charge lesser-included offenses of sexual assault and criminal sexual conduct, and a responding letter dated August 25, 2000 from defense counsel, who objected to "any offenses being charged to the jury other than those alleged in the indictment." The judge did not charge the lesser-included offenses.

Garron was convicted on all counts of the indictment. On September 7, 2000 he moved for a judgment notwithstanding the verdict and for a new trial. On September 25, 2000 Judge Ridgway denied both motions.

On September 11, 2000 the State filed a notice of intention to seek a sentence pursuant to NERA. At the sentencing hearing on December 14, 2000 Judge Ridgway determined that the Graves Act applied to Garron's convictions for first-degree aggravated sexual assault and third-degree aggravated criminal sexual contact. He further concluded that NERA applied to Garron's convictions. Pursuant to NERA, the judge imposed an eleven-year sentence with an 85% period of parole ineligibility (estimated by the State as nine years, three months and five days) and a five-year term of parole supervision for the aggravated sexual assault conviction. Garron was also sentenced to a three and two-thirds year period of parole ineligibility on the aggravated sexual assault conviction pursuant to the Graves Act. On the aggravated criminal sexual contact conviction, Garron was sentenced to a concurrent term of three years with a three-year period of parole ineligibility pursuant to the Graves Act. Finally, Garron was sentenced to a concurrent term of six years with a NERA period of parole ineligibility of 85% (five years and one month) on the official misconduct conviction.[1] An amended judgment of conviction corrected the NERA sentence imposed on Garron's conviction for aggravated sexual assault. Judge Ridgway also imposed appropriate penalties and assessments. He rejected Garron's motion to impose sentence pursuant to *N.J.S.A.* 2C:44-1f(2), which permits the judge to impose a sentence appropriate to a crime of one degree lower than that of the crime for which

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[1] According to the sentencing transcript, Judge Ridgway imposed a Graves Act parole disqualifier of one year, while the original judgment of conviction indicates a three-year parole disqualifier. As the State notes in its brief, the Graves Act mandates a three-year parole disqualifier as stated in the original judgment of conviction. *See N.J.S.A.* 2C:43-6c.

a defendant was convicted. Judge Ridgway found that the mitigating factors substantially outweighed the aggravating factors, and accordingly, he adjusted the presumptive sentence downward from fifteen to eleven years. Finally, Judge Ridgway found that Garron's convictions for aggravated sexual assault and aggravated criminal sexual assault subjected him to sentencing under Megan's Law.

IV

Defendant contends Judge Ridgway should have granted his motion for recusal. According to *R.* 1:12-1,

> [t]he judge of any court shall be disqualified on the court's own motion and shall not sit in any matter . . . (f) when there is any [] reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so.

[*R.* 1:12-1(f).]

Recusal is initially left to the discretion of the trial judge. *State v. Marshall*, 148 N.J. 89, 275-76 (citations omitted), cert. denied, 522 U.S. 850, 118 S. Ct. 140, 139 L. Ed. 2d 88 (1997). The trial judge "is in as good a position as any to evaluate a claim that an action has the appearance of impropriety." *Jadlowski v. Owens-Corning Fiberglas Corp.*, 283 N.J. Super. 199, 221 (App. Div. 1995), certif. denied, 143 N.J. 326 (1996). "Fundamental to any consideration of possible judicial disqualification is a showing of prejudice or potential bias." *Marshall*, 148 N.J. at 276. Before a judge will be disqualified on the basis of an appearance of bias, "the belief that the proceedings were unfair must be objectively reasonable." *Id.* at 279.

The Deputy Attorney General assigned to prosecute Garron in this case was also assigned to prosecute another officer in an unrelated case, and Judge Ridgway was listed as a fact witness for the State in that case. Prior to trial, Garron argued that this presented a potential conflict of interest and an appearance of impropriety. Judge Ridgway perceived no conflict. He found he could decide the issues in this case fairly. In denying the motion without prejudice, the judge stated that he tries "to decide the cases fairly and make the rulings based upon what's [] put on the table and . . . will continue to do so." He did permit Garron to renew the motion at a later date if he chose to do so, but Garron did not renew the motion.

Garron's argument is not persuasive. The mere possibility of a conflict of interest is not sufficient to require a recusal. Garron must demonstrate the proceedings were objectively unfair. No such showing has been made. Simply because the judge was scheduled to be a fact witness in another trial, involving another defendant, but with the same prosecutor, does not support a conclusion that there was a "reasonable" possibility of a conflict of interest or the appearance of an impropriety. Defendant has failed to point to any unfairness during the proceedings which would reflect sufficient justification for Judge Ridgway's recusal.

V

We next turn to defendant's assertion that the judge erred by failing to charge the lesser-included offenses of sexual assault and criminal sexual contact. The remaining charges, including the charge on Garron's consent defense, are not challenged.

Prior to trial, the State had informed Garron that the

lesser-included offense for first-degree aggravated sexual assault was second-degree sexual assault, and the lesser-included offense for third-degree aggravated criminal sexual contact was fourth-degree criminal sexual contact. At the charge conference on August 24, 2000, the judge indicated that he would charge the lesser-included offenses. However, after receiving the correspondence dated August 24 and August 25, from the State and defendant respectively, the judge decided not to charge the lesser-included offenses. He reasoned that the "alleged act occurred as the result of fear generated by a weapon held by defendant, or at least in his possession." He pointed out that the pistol Garron put on the dresser was a weapon "contemplated by the [aggravated sexual assault] statute" as "agreed upon by the Court and counsel." See *N.J.S.A.* 2C:14-2a(4); *N.J.S.A.* 2C:14-3a.

On appeal, Garron contends that Judge Ridgway's failure to charge the lesser-included offenses warrants a reversal. We conclude that the judge properly declined to charge the lesser-included offenses.

An offense is lesser-included when:

> (1) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
>
> (2) It consists of an attempt or conspiracy to commit the offense charged or to commit an offense otherwise included therein; or
>
> (3) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability

suffices to establish its commission.

[*N.J.S.A.* 2C:1-8d.]

If there is no rational basis for a jury to convict on the lesser-included offense, the court "shall not charge the jury with respect to an included offense." *N.J.S.A.* 2C:1-8e. There must be a "rational basis in the evidence for a jury to . . . acquit the defendant of the charged offense before the court may instruct the jury on an uncharged offense." *State v. Brent*, 137 N.J. 107, 113-14 (1994) (citations omitted). *See also State v. Savage*, __ N.J. __ (2002) (slip op. at 27). When the defendant requests a lesser-included charge, "the trial court is obligated . . . to examine the record thoroughly to determine if there is a rational basis in the evidence for finding that the defendant was not guilty of the higher offense charged . . . ." *State v. Sloane*, 111 N.J. 293, 299 (1988).

"Correct jury instructions are essential for a fair trial since they are at the heart of the proper execution of the jury function." *State v. Green*, 318 N.J. Super. 361, 372 (App. Div.) (citing *State v. Alexander*, 136 N.J. 563, 571 (1994)), *aff'd o.b.*, 160 N.J. 140 (2000). "Erroneous instructions on matters or issues material to the jurors' deliberations are presumed to be reversible error." *State v. Grunow*, 102 N.J. 133, 148 (1986) (citations omitted); *Sloane*, 111 N.J. at 299. Failure to so instruct the jury amounts to providing the jury with the stark choice between conviction on the greater offense or acquittal, and juries are more likely to convict on the greater offense. *Ibid.* The purpose is "to assure fairness in the fact-finding process at trial through the avoidance of the coercive prejudice of an all-or-nothing verdict." *State v. Scherzer*, 301 N.J. Super. 363, 480 (App. Div.), certif. denied, 151 N.J. 466 (1997).

Garron draws an analogy between his case and *Sloane*. In that case, the defendant stabbed the victim with

a knife. The defendant was indicted for second-degree aggravated assault. The trial judge found that the degree of injury was "serious bodily injury," and refused to charge the jury on a lesser-included assault offense. *Sloane*, 111 N.J. at 296-97. The jury convicted the defendant of the second-degree aggravated assault charge. The Supreme Court reversed holding that the victim's degree of injury was a factual question for the jury to decide. *Id.* at 294. The Court held that under the facts of that case, the trial judge was required to charge on the lesser-included offense of third-degree aggravated assault because the jury could have found that the stab wounds the victim suffered constituted "bodily injury" rather than "serious bodily injury." *Ibid.*

Similarly, here Garron argues that even if J.S.'s version of the facts was accepted by the jury, Judge Ridgway should have provided a jury instruction on the lesser-included offenses. The relevant facts are as follows. Garron was in uniform when he entered J.S.'s home. Although Garron denied that the light was activated during the sexual encounter, according to J.S., Garron placed his service revolver on the dresser and a red laser light was activated and beamed from the pistol's barrel toward the wall. J.S. testified that although Garron did not expressly threaten to use the gun, she saw the light and "just kept looking" at it. J.S. thought the red light indicated that the gun was "ready to shoot." She "thought the trigger was already pulled back and it just needed one little nudge." Likewise, Henry testified that J.S. told her she felt threatened and was frightened the gun might discharge.

Garron argues that although this version of the facts could support a conviction for the first-degree offense, the "jury [also] could have found that the gun was collateral,

ancillary, and merely present during the commission of the sexual assault and criminal sexual contact." Because "accidental" conduct implies negligence or recklessness rather than purposeful or knowing conduct, there was a rational basis to charge the lesser-included offenses to the jury. Whether or not her fear was reasonable was "rationally debatable" and thus a question for the jury under *Sloane*.

Further, Garron contends that if the jury had found that Garron simply had the gun on his person because he was a police officer and did not threaten to use it, the jury could have found there was insufficient evidence to establish the element of "threaten[ing the victim] by word or gesture to use the weapon." *See N.J.S.A.* 2C:14-2a(4). Not wishing to acquit, Garron argues, the jury convicted on the offenses charged.

But for defense counsel's strategic decision to oppose charging any offenses which were not included in the indictment, Garron's arguments would have merit. But as the State points out, not only did Garron fail to object during the charge conference to Judge Ridgway's decision not to provide lesser-included instructions, by virtue of defense counsel's August 25, 2000 letter to the court, defendant specifically requested that lesser-included offenses not be charged. In his letter, defense counsel stated, "I object to any supposed included offense being presented to this jury of sexual assault or sexual criminal contact." On appeal, defendant argues the trial judge had an obligation to disregard trial counsel's request not to charge the lesser-included offenses and to charge the lesser-included offenses because the evidence could have supported a verdict based on the lesser-included offenses.

Generally, if error is not brought to the trial court's attention, an appellate court will not reverse on the grounds of such error unless the defendant shows plain error: i.e., error "clearly capable of producing an unjust result." *R.* 2:10-2. The possibility of an unjust result must be "sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached." *State v. Macon*, 57 *N.J.* 325, 336 (1971). However, certain jury instructions are so crucial to a jury's deliberations on the guilt of a criminal defendant, that errors in those instructions are presumed to be reversible. *See State v. Simon*, 79 N.J. 191, 206 (1979); *State v. Weeks*, 107 N.J. 396, 410 (1987) (citations omitted).

There are corollaries to the plain error rule. The failure to raise error below may be taken by an appellate court to mean that counsel did not consider the error to be significant in the context of the trial. *Macon*, 57 N.J. at 333. Errors created by counsel are not ordinarily grounds for reversal. *State v. Harper*, 128 N.J. Super. 270, 276-77 (App. Div.) (citations omitted), certif. denied, 65 N.J. 574 (1974). An appellate court may, however, notice plain error not brought to the attention of the trial court in the interest of justice. *R.* 2:10-2.

In support of his claim that despite trial counsel's request not to charge the lesser-included offenses the trial judge should have presented those charges to the jury anyway, defendant refers to *State v. Powell*, 84 N.J. 305, 318-19 (1980). In *Powell*, the Court concluded that the evidence warranted manslaughter charges despite that "no request for a manslaughter charge was made" and the defense attorney specifically requested that the charge not be given. *Id.* at 318. The Court went on to state that even though counsel requested that no charge be given,

> where the facts on the record would justify a conviction of a certain charge, the people of this State are entitled to have that charge rendered to the jury, and no one's strategy, or assumed (even real) advantage can take precedence over that public interest. It matters not that the defendant's counsel may be *correct* in the belief that acquittal is more likely without such charge, or that defendant himself is willing to take that chance; nor does it matter that the prosecutor is content to forego the manslaughter instruction in the hope that a conviction of murder will result.

[*Id.* at 319.]

Subsequently, in *State v. Perry*, 124 N.J. 128 (1991), the Court revisited the issue of whether a judge should charge a jury contrary to a defendant's request. Perry was convicted of capital murder and lesser offenses. Defendant did not request a self-defense charge at trial. The Supreme Court concluded that the trial court did not commit plain error by not charging self-defense *sua sponte*. The Court stated:

> Trial courts must carefully refrain from preempting defense counsel's strategic and tactical decisions and possibly prejudicing defendant's chance of acquittal. The public interest, while important, may not overwhelm defendant's interest in pursuing a legitimate defense in the complex setting of a criminal trial . . . . . [A] trial court nonetheless should be sensitive to the potential that such charges might prejudice a defendant's case with respect to a greater crime . . . and make defendant's conviction for the greater crime more likely . . . . Our analysis of the duties of a trial judge must be

> 'seasoned by a degree of deference to defense counsel's strategic decisions.'

[*Id.* at 162-63 (citations omitted).]

In *State v. Marshall*, 123 N.J. 1, 93 (1991), cert. denied, 507 U.S. 929, 113 S. Ct. 1306, 122 L. Ed. 2d 694 (1993), the Court cited to *State v. Ramseur*, 106 N.J. 123, 281-82 (1987), for the proposition that

> [t]he defendant cannot . . . request the trial court to take a certain course of action, and upon adoption by the court, take his chance on the outcome of the trial, and if unfavorable then condemn the very procedure he sought and urged, claiming it to be error and prejudicial. To justify reversal on the grounds of an invited error, a defendant must show that the error was so egregious as to cut mortally into his substantive rights . . . .

[Internal citations and quotations omitted.]

We are faced here with a somewhat unique set of circumstances; the State requested the lesser-included offenses, while defendant specifically objected to their inclusion. Defendant's position was tactical based on the perception that he would be acquitted of the offenses charged in the indictment. As is set forth in the August 25 letter, the defense believed that there was insufficient evidence to support the "allegation that physical force . . . resulted in the fellatio" or in "defendant's alleged self-masturbation." Defendant clearly took a forceful position that the lesser-included offenses of sexual assault and criminal sexual contact should not be charged. The trial judge agreed. So do we. Defendant received the benefit of the charge he requested. A trial judge should not be required to second-guess a defense attorney's strategic

decisions. Nor should a defendant be permitted to request "a certain course of action" and "condemn the very procedure sought" if the outcome is not favorable. *See Ramseur*, 106 N.J. at 281-82. Our Supreme Court's decisions in *Ramseur*, *Marshall* and *Perry* fully support the trial judge's decision not to charge the lesser included offenses. We find no plain error. *R.* 2:10-2.

VI

We next address defendant's arguments concerning the exclusion of evidence of the victim's prior sexual conduct. After a pretrial hearing in accordance with the Rape Shield statute, *N.J.S.A.* 2C:14-7, Judge Ridgway admitted evidence that J.S. had grabbed Garron's buttocks on one occasion and had twice kissed him passionately. Judge Ridgway excluded other evidence of prior sexual conduct which he found not probative of whether a reasonable person would have believed J.S. freely and affirmatively consented to the sexual conduct on September 28. Garron argues that the exclusion of this evidence was reversible error. The State responds that Garron was not prejudiced by the exclusion of this evidence because the three instances of sexual conduct which were admitted were the most explicit.

In a written opinion, Judge Ridgway found that Garron offered clear and convincing evidence to overcome the statutory presumption against admission of the prior sexual conduct between J.S. and Garron. He found these three instances of J.S.'s conduct were "highly probative and material of whether J.S. consented to the sexual conduct on the day in question." Judge Ridgway excluded other evidence of J.S.'s conduct because he concluded that it was merely "flirtatious" and "not probative of whether a reasonable person would have believed that J.S. freely and affirmatively consented to the sexual conduct on September 28, 1998." *See State v. Budis*, 125 N.J. 519, 532 (1991); *State v. Clowney*, 299 N.J. Super. 1, 15 (App. Div.),

certif. denied, 151 N.J. 77 (1997). He also found that the descriptions of these latter events consisted of "vague statements" and offered "limited detailed information of the alleged prior sexual conduct."

Garron first points out that if the excluded evidence concerned merely flirtatious behavior, it does not fall under the purview of the Rape Shield statute and cannot be excluded by reason of that statute. This argument is based upon Judge Ridgway's conclusion that the behavior was flirtatious, not sexual. However, Garron's argument is belied by his position that the purpose of having the evidence admitted is to demonstrate that a reasonable person would believe that J.S. consented to the sexual behavior complained of. In light of Garron's purpose in admitting the evidence, therefore, the Rape Shield statute applies.

Substantively, Garron argues that the evidence was "highly relevant" to his consent defense and its probative value outweighed its prejudicial effect. He claims that J.S.'s statements to Garron indicated she wanted to have a sexual relationship with him, and "a reasonable person, knowing what defendant knew [on September 28, 1998] would have believed that [J.S.] freely and affirmatively permitted the sexual behavior complained of." *See N.J.S.A.* 2C:14-7d. He claims the sexual contacts corroborated Garron's position that the statements were intended as invitations for a sexual encounter.

Garron's arguments are not persuasive. At the hearings on this issue on June 12 and June 15, 2000, five witnesses testified. In his July 19, 2000 written decision, the judge listed the incidents Garron wanted to place before the jury:

1) That J.S. has on unspecified occasions asked the defendant to drive her to work when she was employed by the Cumberland County Prosecutor's Office; 2) That J.S., on unspecified occasions while working at the Cumberland County Prosecutor's Office, flirted with the defendant by touching him, hugging him and brushing up against him; 3) That while J.S. worked at the Cumberland County Prosecutor's Office she made statements to the defendant that she was "gonna get that man" and that she "needed a man like that" and that the defendant was "too good" for his wife; 4) That while J.S. worked at the Cumberland County Prosecutor's Office she grabbed the defendant's buttocks; 5) That on the last day that J.S. worked for the Cumberland County Prosecutor's Office in March of 1997, she forced herself on the defendant and kissed him in a provocative manner; 6) That after J.S. had stopped working for the Cumberland County Prosecutor's Office, she approached the defendant while he was on the front porch of the Prosecutor's Office and stated that she was ready to have an affair with the defendant now that she no longer had to see the defendant's wife every day; 7) That on an occasion in 1998 when J.S. met with the defendant at the Bridgeton Police Department to take care of a motor vehicle warrant, J.S. forced herself on the defendant and kissed him in a provocative manner; [and] 8) That during the sexual assault at issue in this case, the victim forced herself on the defendant and kissed him in a provocative manner.

After reviewing the testimony concerning each of

the alleged incidents of prior sexual conduct, the judge made the following findings:

> The Court finds[,] however, that only three instances of sexual conduct, specifically, the alleged grabbing of the defendant's buttocks, and the two alleged passionate kisses [are] relevant to show that J.S. consented to the sexual conduct. The remaining evidence the defendant seeks to have admitted is merely flirtatious conduct, not sexual conduct. In fact, each witness, including the defendant's wife, made it clear that the conduct and statements between the defendant and J.S. [were] "flirtatious" and that such conduct was "taken lightly". Such flirtatious conduct is not probative of whether a reasonable person would have believed that J.S. freely and affirmatively consented to the sexual conduct on September 28, 1998.
>
> However, evidence of J.S.'s grabbing of the defendant's buttocks and the two passionate kisses between J.S. and the defendant, in the Court's opinion could cause a reasonable person, who was involved in those prior incidents to believe that J.S. freely consented to the sexual conduct on September 28, [1998]. Morever, absent such evidence, a jury would be lead to believe there was no sexual conduct between the defendant and J.S. prior to the date of the alleged sexual assault. The prior sexual conduct is highly probative and material of whether J.S. consented to the sexual conduct on the day in question.

The judge went on to conclude that the

other evidence the defendant seeks to admit is excluded because it offers limited detailed information of the alleged prior sexual conduct. The defendant's failure to offer a specific detailed information precludes the admission of such evidence. *State v. Rowe*, 316 N.J. Super. 425 (App. Div. 1998).

The New Jersey Rape Shield statute provides:

> a. In prosecutions for aggravated sexual assault, . . . evidence of the victim's previous sexual conduct shall not be admitted . . . except as provided in this section . . . . If the court finds that evidence offered by the defendant regarding the sexual conduct of the victim is relevant and highly material and meets the requirements of subsections c. and d. of this section and that the probative value of the evidence offered substantially outweighs its collateral nature or the probability that its admission will create undue prejudice . . . . the court shall enter an order setting forth . . . what evidence may be introduced and the nature of the questions which shall be permitted . . . .
>
> b. In the absence of clear and convincing proof to the contrary, evidence of the victims's sexual conduct occurring more than 1 year before the date of the offense charged is presumed to be inadmissible under this section.
>
> * * *
>
> d. Evidence of the victim's previous sexual conduct with the defendant shall be considered relevant if it is probative of whether a reasonable person . . . would have

> believed that the alleged victim freely and affirmatively permitted the sexual behavior complained of.
>
> [*N.J.S.A.* 2C:14-7a, b, & d.]

When seeking to admit evidence of a victim's previous sexual conduct under the Rape Shield statute, a defendant, wherever possible, should "certify in writing with reasonable specificity when, where, and under what circumstances the prior acts occurred . . . ." *Rowe*, 316 N.J. Super. at 436. Whether a defendant's proofs are reasonably specific to justify admission of evidence of prior sexual acts "will rest in the sound discretion of the trial court." *Ibid.*

Judge Ridgway found that the testimony and certifications "merely consisted of vague statements of alleged sexual conduct, such as hugging and flirting between defendant and J.S.," and that no witness could testify when such conduct occurred, but only sometime while J.S. was working at the Prosecutor's Office between September 1992 and March 1997. The judge concluded that this evidence was not specific enough to be probative of whether a reasonable person would have believed that J.S. freely and affirmatively consented to the sexual conduct on September 28 so as to warrant its admission. *See Pullen v. Georgia*, 431 S.E.2d 696, 698-99 (Ga. Ct. App. 1993) (trial court properly excluded irrelevant evidence of victim's flirtatious conduct with defendant when defendant did not testify to any prior sexual activity with the victim). Garron and his witnesses were unable to specify dates, circumstances, or precise times and locations the alleged sexual contact occurred. According to the judge, who had an opportunity to observe the witnesses at the Rape Shield hearing, the conduct complained of was

"taken lightly" by the parties. This conclusion is supported by the record.

Wendy Frost, an employee of the Cumberland County Prosecutor's Office testified that she saw J.S. touch Garron's shoulder and arm; she recalled giggling and laughing. She said she heard J.S. say that while Stephanie Garron was away, J.S. "would have no problems going to see [Garron]." On cross-examination, Frost acknowledged that when Stephanie Garron heard J.S. make suggestive comments about Garron, she "took it all lightly at that time." Another former employee of the Prosecutor's Office, Terri Seay, testified that J.S. acted in a flirtatious manner with Garron; she would brush her breast up against Garron's arm and "the front part of him;" she would also hug him. Seay never personally heard J.S. make any comments concerning Garron.

Barbara Carney, another Prosecutor's Office employee, testified that she observed J.S., Garron and Stephanie Garron "just joking in general . . . ." The three were always on friendly terms until J.S. leveled the accusations against Garron. Even Stephanie Garron admitted, on cross-examination, that she took J.S.'s overtures to her husband in a light-hearted way:

> Q. -- and he would make comments and flirt with her?
>
> A. Yes.
>
> Q. This was done in front of you?
>
> A. Yes, ma'am.
>
> Q. And you took this in a light-hearted way?

A. Yeah, for the most part I really did. [J.S.] was not [a] threat to me.

* * *

Q. The only time that you can remember that anything [J.S.] did you took to be something inappropriate or something more than a joke was the time that you had heard she touched your husband's rear end?

A. Yes.

We do not find Judge Ridgway abused his discretion by precluding admission of the flirtatious conduct into evidence. He distinguished between that evidence from which a jury could reasonably infer was indicative of J.S.'s consent to a sexual encounter with defendant -- the passionate kisses and J.S. grabbing defendant's buttocks, and the other evidence which the witnesses characterized as flirtatious conduct taken lightly by the parties. We agree that the latter was not sufficiently probative to lead a reasonable person to believe that J.S. consented to Garron's sexual assault in September 1998.

We are also satisfied that even if we were to conclude that the omission of the evidence was error, it was harmless in light of the evidence of alleged sexual conduct which was admitted at trial. Garron told the jury that the kisses he received from J.S. were passionate. He described one kiss as a "French Kiss" -- "[J.S.] had put her tongue in my mouth." There was evidence that J.S. touched defendant's buttocks. Stephanie Garron testified that after kissing defendant, "[J.S.] began to fan herself . . . telling me . . . he's a great kisser. And should I ever want to get rid of him please just . . . send him her way." Defense counsel highlighted these events in his closing. Given this evidence, the jury was well-aware that J.S. had made

sexual advances towards defendant prior to the sexual encounter which resulted in the criminal charges. Viewing the evidence as a whole, any error made by the trial court was harmless. *See Scherzer*, 301 N.J. Super. at 418.

VII

Defendant next asserts the trial judge erred when he permitted Henry to testify to what J.S. told her about the assault. Judge Ridgway admitted the testimony on two grounds: (1) that the victim's statements were excited utterances; and (2) that because Henry was a "natural confidante" of J.S., the statements qualify under the "fresh complaint doctrine." *See Biunno, Current N.J. Rules of Evidence*, comment 2 on *N.J.R.E.* 803(c)(2) (2002) (describing the fresh complaint doctrine).

At a pre-trial hearing, Judge Ridgway heard testimony from Henry and Light. Henry testified that on the morning of September 28, 1998, she arrived at work around 7:30 a.m. She found J.S. sitting at her desk. J.S. seemed "distant." They later went to Wawa to purchase lunch together; en route J.S. told Henry that J.S. was raped earlier that morning. J.S. recounted the details of the sexual assault. As J.S. spoke about the rape she seemed "dazed, like she was still in shock." J.S. told Henry she did not know if she was going to report the rape to the police because she did not want to ruin Garron's family.

After returning to work, J.S. ran into the bathroom. Henry followed her in, where she observed J.S. "sitting in the corner rocking and shaking and crying." Henry tried to "calm her down," and after ten minutes had passed, Henry sought assistance from Light. J.S. described the assault to Light. The women returned to work where J.S. remained "very quiet." J.S. eventually received permission from her supervisor to go home. Henry followed her to ensure she arrived home safely. Henry testified that J.S. was initially afraid to enter her house.

Light also testified. She said she had a good rapport with J.S. at work, but they did not otherwise socialize. Light testified that when she entered the bathroom she found J.S. standing against the lockers and her eyes were red as if she had been crying. Henry "blurted out" that J.S. had been raped earlier that morning. Then J.S. recounted for Light the details of the assault.

In a written opinion, Judge Ridgway found that while both Henry's and Light's testimony met the standard of an excited utterance, the judge excluded Light's testimony because it "would be duplicative and therefore overly prejudicial to the defendant." Judge Ridgway admitted Henry's testimony substantively as an excited utterance. By doing so, Garron argues that the judge erred.

An "excited utterance" is an exception to the hearsay rule that does not depend on the unavailability of the witness. It is:

> A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition and without opportunity to deliberate or fabricate.

[*N.J.R.E.* 803(c)(2).]

To determine whether to admit testimony under the excited utterance exception, the trial judge "must determine whether the declarant had the opportunity for deliberation, reflection, or misrepresentation before [she] made the statement, or whether the statement was truly spontaneous and made solely under the stress of excitement." *State v. Lazarchick*, 314 N.J. Super. 500, 522 (App. Div.) (citations omitted), certif. denied, 157 N.J. 546 (1998).

Among the factors a judge must consider are: (1) the amount of time between the initial observation of the event and the subsequent declaration of the statement; (2) the circumstances of the event; (3) the mental or physical condition of the declarant; (4) the shock produced; (5) the nature of the statement; and (6) whether the statement was made voluntarily or in response to a question. See Biunno, comment 1 on *N.J.R.E.* 803(c)(2) (citing *Lieberman v. Saley*, 94 N.J. Super. 156, 161 (App. Div. 1967)); *State v. Williams*, 106 N.J. Super. 170, 172 (App. Div.), certif. denied, 55 N.J. 78 (1969), cert. denied, 397 U.S. 1057, 90 S. Ct. 1405, 25 L. Ed. 2d 675 (1970). This test is met when "the circumstances reasonably warrant the inference that the statement was made as an uncontrolled response to the shock of the event before reasoned reflection could have stimulated a self-serving response." Cestero v. Ferrara, 57 N.J. 497, 504 (1971).

An excited utterance "need not be contemporaneous with the exciting event. The crucial element is the presence of a continuing state of excitement that contraindicates fabrication and provides trustworthiness." *State v. Lyle*, 73 N.J. 403, 413 (1977); *see also Truchan v. Sayreville Bar and Rest., Inc.*, 323 N.J. Super. 40, 49 (App. Div. 1999). The time interval between the startling event and the statement does not determine whether the statement is admissible as an excited utterance, and the decision whether to admit a statement as an excited utterance rests in the sound discretion of the trial judge. *Truchan*, 323 N.J. Super. at 49-50.

Approximately eight hours passed between the assault and J.S.'s statement to Henry. During that period J.S. drove to work and performed her job. The question

the judge was required to address was whether J.S. had an opportunity for reflection and fabrication during this time. Judge Ridgway's detailed opinion reflects a careful analysis of this issue. He stated:

> Moreover, the time interval of approximately eight (8) hours between the incident and J.S.'s complaint does not preclude her statements as an excited utterance. The key is whether J.S. continued to be under the stress of the excitement during the eight hour period and therefore lacked the opportunity to deliberate or fabricate the sexual assault. The Court has already found that J.S. was under the stress of the excitement at the time she made her complaint to Henry. A sexual assault is clearly a traumatic incident that may cause each person to react differently. The eight hour interval was not unreasonable considering the alleged charges of sexual assault and the witnesses[']' observations of J.S.'s emotional state. In addition, J.S.'s complaint of the alleged sexual assault was not the result of any questioning by Henry, but was volunteered by J.S. The Court therefore holds that the testimony . . . is admitted as an excited utterance pursuant to *N.J.R.E.* 803(c)(2). Since the statement by J.S. to [] Henry has been qualified as an excited utterance, Henry's testimony will be admitted as substantive evidence of the alleged sexual assault.

We find no fault with Judge Ridgway's analysis, or his decision to admit Henry's statements. All of the evidence considered in context supports a conclusion that J.S. continued to be under the stress of the sexual assault when she disclosed to Henry that she had been raped by

defendant. In light of her condition at the time -- she was characterized as being in shock, mentally and emotionally distraught, dazed and withdrawn -- to find that she was under the stress of the assault is wholly supportable by the record. Rather than reflecting and deliberating during the eight-hour interval between the assault and when she disclosed the assault to Henry, the evidence presented to the judge reveals that J.S. continued to suffer the shock of the sexual assault. The judge considered all of the requirements for admissibility as an excited utterance and properly exercised his discretion.[2]

VIII

We next turn to whether the trial court erred when it failed to order production of J.S.'s personnel and employment records. Prior to trial, Garron moved for production, or an *in camera* review, of J.S.'s personnel and employment records, on the grounds that the records contained evidence of motive for J.S. to fabricate the sexual assault charges, evidence of J.S.'s lack of credibility, and evidence of prior false and retaliatory charges by J.S. against other males. Garron argues that Judge Ridgway committed reversible error by denying the request.

Deference is generally given to the trial judge's ruling on discovery matters unless there was an abuse of discretion. *Wilson v. Amerada Hess Corp.*, 168 N.J. 236, 253 (2001) (citation omitted). There is a "significant" public interest in maintaining the confidentiality of police personnel records. *State v. Kaszubinski*, 177 N.J. Super. 136, 138 (Law Div. 1980). Personnel records of

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[2] In light of our determination that Henry's testimony was admissible as an excited utterance, we choose not to address whether Henry's testimony was also admissible under the fresh complaint doctrine.

governmental employees are protected in New Jersey by Executive Order No. 11 (November 15, 1974). *State v. Jones*, 308 N.J. Super. 15, 44 (App. Div. 1998). Before allowing discovery of personnel or employment records a defendant must show that the records reveal acts relevant to issues at trial, or at least provide a factual basis for the claim. *Id.* at 41-44.

Garron argues that he had a constitutional right to J.S.'s employment and personnel records because confidentiality of such records does not trump the confrontation clauses under the Federal and State Constitutions:

> The determination of whether police personnel records should be disclosed involves a balancing between the public interest in maintaining the confidentiality of police personnel records and a defendant's guarantee of cross-examination under the Confrontation Clause. In balancing these considerations, the party seeking an *in camera* inspection must advance some factual predicate which would make it reasonably likely that the file will bear such fruit and that the quest for its contents is not merely a desperate grasping at a straw . . . . It is generally not necessary for a defendant to establish that the personnel file actually contains relevant information so long as the proper factual predicate has been met.

[*State v. Harris*, 316 N.J. Super. 384, 397-98 (App. Div. 1998) (citation and internal quotations omitted).]

Garron claimed at the pretrial motion hearing that he had gathered information that J.S. was habitually tardy at

her job and was placed on probation for tardiness. He argues that because she was late for work on the day of the sexual assault, J.S.'s tardiness provided a motive for her to fabricate the sexual assault. However, as Judge Ridgway stated at the hearing, even if the documents contained evidence of discipline for tardiness, this was not relevant to Garron's consent defense. The judge said, "You want the jury to make the mental jump that she made this whole thing up to explain away her being tardy?" In other words, the judge concluded that a jury could not reasonably draw an inference that simply because J.S. had been late for work she fabricated the sexual assault. We agree with the judge that there is no reasonable basis upon which the jury could make such a connection.

Defendant also requested to review the personnel files to determine if J.S. had been reprimanded not to wear certain clothing to her place of employment. Counsel stated, "I would think that that's relevant with respect to her ability to make herself attractive to men." The judge found this proffer "patently inadmissible." We agree.

Finally, defendant was unable to advance a factual predicate for his argument that J.S. had made unsupported claims against other men. Garron proffered not one scintilla of admissible evidence at the time he moved to review J.S.'s personnel records to support his attorney's statement that he wanted to review J.S.'s records to determine if there were "any complaints made . . . about [J.S.] by other employees . . . [about] her being engaged in a relationship with some married men and making some claims back towards them." The motion transcript on March 10, 2000 is devoid of any evidence to support the request. The certification in support of the motion, dated January 18, 2000, was signed by counsel and was not evidentiary. *See R.* 1:6-6; *Murray v. Allstate Ins. Co.*, 209 N.J. Super. 163, 169 (App. Div. 1986). Additionally,

counsel's certification made reference to two individuals, including J.S.'s previous husband, who allegedly had information concerning this claim. Neither were called as witnesses at the motion hearings or at trial. Defendant's proofs on this issue simply were not sufficient to make a review of the records fruitful. *See also R.* 1:7-3. In his September 25, 2000 letter opinion regarding the defendant's motions for judgment of acquittal and new trial, Judge Ridgway, revisiting defendant's request for an in camera review of J.S.'s personnel files, again concluded that the probative value of the evidence did not outweigh its possible prejudicial effect. We do not find the judge's decision to deny the request for personnel records an abuse of discretion. *See State v. Feaster*, 156 N.J. 1, 82 (1998), certif. denied, 165 N.J. 388 (2000), cert. denied, 532 U.S. 932, 121 S. Ct. 1380, 149 L. Ed. 2d 306 (2001).

IX

Defendant further asserts that the trial judge court erred by ruling that NERA was applicable in this case. This argument is patently without merit. NERA imposes a mandatory prison term of 85% of the overall sentence and a mandatory three to five-year period of post-conviction release parole supervision, for any first or second-degree conviction that is found to constitute a violent crime. *State v. Johnson*, 166 N.J. 523, 527 (2001).

NERA requires that grounds for the enhanced sentence be established at a post-conviction evidentiary hearing and on written notice to the defendant so that the defendant has an opportunity to hear and controvert the evidence against him and to offer evidence on the issue. *N.J.S.A.* 2C:43-7.2e, repealed by *L.* 2001, *c.* 129, 1 (effective June 29, 2001). The notice must be filed with

the court and served on the defendant within fourteen days of the verdict, although the court may extend the time for filing notice for good cause. *R.* 3:21-4(f).

Here, the jury convicted Garron as charged on August 28, 2000. On September 11, 2000 the State filed a notice of intention to seek sentencing pursuant to NERA based upon "the facts and circumstances supporting" Garron's convictions on all three counts. Garron's attorney received a copy of the notice on September 14, 2000.

On October 17, 2000 Garron requested from the State details of the factual grounds for sentencing him under NERA. On October 26, 2000 the State explained that Garron used or threatened immediate use of a deadly weapon in committing the offenses. The State also noted that it would serve the previously filed notice of intention on Garron personally, which occurred on October 30, 2000.

Garron repeats two points he asserted at the sentencing hearing. First, he argues that contrary to the language of *N.J.S.A.* 2C:43-7.2e, the copy of the notice of intention he received did not state the ground of the applicability of NERA to his case. This claim is not supported by the record. The State's grounds to support its intention to seek NERA sentencing were spelled out in detail in the October 30, 2000 letter. Moreover, at the time of sentencing, defendant did not argue that the lack of detail in the first notice was a basis to excuse him from being sentenced under NERA. And as the State points out, a court may extend the time for filing a notice for good cause. Thus, the purpose of *N.J.S.A.* 2C:43-7.2e was satisfied in this case. There is no evidence that the procedure to notify defendant that he would be sentenced

pursuant to NERA prejudiced defendant.

Second, defendant argues that contrary to *R.* 3:21-4(f), he was not personally served with the notice of intention within fourteen days. Although his attorney was timely served, defendant argues the rule presupposes a distinction between defendant and his attorney. Yet, under the *Rules of Professional Conduct,* (RPC) an attorney "shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter . . . unless the lawyer has the consent of the other lawyer." RPC 4.2. Here, the State properly sent the notice of intent to Garron's attorney. This procedure complies with RPC 4.2. Defendant had fair notice that NERA applied.

X

Finally, defendant claims his right to effective assistance of counsel was denied under the Sixth and Fourteenth Amendments of the United States Constitution and Art. 1, Par. 10, of the New Jersey Constitution. He alternatively claims that the case should be remanded for a post-conviction relief proceeding pursuant to *R.* 2:9-1. Defendant claims that trial counsel failed to (1) properly investigate the case and was unprepared; (2) present witnesses substantiating that J.S. had engaged in prior bad acts; (3) properly cross-examine J.S. with regard to her prior inconsistent statements; and (4) object to J.S.'s victim impact testimony, to non-fresh complaint witnesses testifying as to fresh complaint evidence, to the introduction of prior consistent statements for corroborative purposes where no impeachment had incurred, and to hearsay testimony. Because these allegations require evidence that lies outside the record, the ineffective assistance of counsel

claim is particularly suited for a post-conviction review application. *State v. Preciose*, 129 N.J. 451, 460 (1992) (citing *State v. Mitchell*, 126 N.J. 565, 585 (1992)); *State v. Lane*, 279 N.J. Super. 209, 224 (App. Div.) (citations omitted), certif. denied, 141 N.J. 94 (1995). We therefore decline to address the ineffective assistance of counsel claim at this time.

XI

On appeal, the State argues the judgment of conviction should be amended to reflect that defendant must forfeit public office and the position he now holds, and that he be forbidden from holding any future public employment or position, pursuant to *N.J.S.A.* 2C:51-2, based on defendant's conviction of second-degree official misconduct. In his reply brief, defendant concedes that forfeiture is appropriate if his convictions are upheld. We therefore remand to the Law Division to amend the judgment of conviction to reflect the application of *N.J.S.A.* 2C:51-2.

Affirmed in part and remanded in part.

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION
SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2279-00T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANDERSON GARRON,

Defendant-Appellant.

WECKER, J.A.D., dissenting. July 9, 2002

I respectfully dissent. Despite the trial judge's careful attention to the issues raised by counsel, two significant errors deprived defendant of an opportunity to establish reasonable doubt that he committed the crimes charged. First, error in applying the so-called Rape Shield Law, *N.J.S.A.* 2C:14-7, deprived defendant of relevant evidence to counter an essential element of aggravated sexual assault and aggravated criminal sexual contact, the charges on which defendant was convicted. That element is the use of "physical force or coercion." Second, even if the jury rejected defendant's contention that his admitted sexual conduct with J.S. was consensual, failing to charge the jury on the lesser included offenses of sexual assault and criminal sexual contact deprived defendant of the opportunity to be convicted only on those lesser offenses for which there was a rational basis.

I

The first harmful error was the exclusion of testimony proffered by defendant, by his wife, and by two

independent witnesses, that J.S. had on several occasions expressed her physical attraction to and desire for the defendant by verbal conduct directed to defendant and to others. J.S., the complaining witness, and the defendant had known each other for some years, and there was no dispute at trial that the sex acts charged did occur. The first question for the jury to resolve was whether the State proved that J.S. did not consent to those acts and that defendant did not reasonably believe that she had consented. The excluded testimony was part of the *res gestae* and highly relevant to both aspects of that question. While we normally defer to a trial judge's exercise of discretion in evidentiary decisions, a clearly mistaken exercise of discretion amounts to legal error.

Defendant sought a ruling on the admissibility of this testimony prior to trial, as required, and Judge Ridgway conducted an *in camera* hearing on this evidentiary issue, as required by *N.J.S.A.* 2C:14-7a. That law excludes "evidence of the victim's previous sexual conduct . . . except as provided." The exception at issue is provided by *N.J.S.A.* 2C:14-7d:

> Evidence of the victim's previous sexual conduct *with the defendant* shall be considered relevant if it is probative of whether a reasonable person, knowing what the defendant knew at the time of the alleged offense, would have believed that the alleged victim freely and affirmatively permitted the sexual behavior complained of.

At the hearing, the judge heard the proposed testimony concerning J.S.'s prior conduct toward defendant. The judge concluded that the jury would be permitted only to hear evidence of three incidents involving direct physical contact between J.S. and the defendant: two occasions on which J.S. kissed defendant on the mouth, and one occasion when J.S. grabbed defendant's buttocks. The judge barred entirely the testimony of two other prosecutor's office employees, as well as portions of the

proffered testimony of defendant and his wife ("Stephanie" or "Mrs. Garron") describing other conduct and comments by J.S.

A detailed review of the excluded evidence of incidents that took place in the Cumberland County Prosecutor's office, where both J.S. and Mrs. Garron worked, is essential to fair consideration of this issue. Some of that evidence would have come from the testimony of the two employees who worked with J.S. and Stephanie Garron. At the pre-trial hearing, one employee, Wendy Frost, testified that during the approximately two-year period when J.S. worked in the Grand Jury Unit[1], whenever defendant

> would come in and see Stephanie, [J.S.] would immediately get up from her desk. She would run over and interact with [defendant] touching, standing by him touching his shoulder, grabbing his arm. . . .
>
> [T]here were several occasions where people in the office made comments that she should not be saying that to him, that he was a married man, that his wife was standing right there, you know, that it was very inappropriate.

She described the physical conduct she observed:

> [J.S.] would get up and stand extremely close to Andy while he was standing there talking to his wife. She would make sure she brushed up against him, his arm. She would grab his arm. . . . [a]nd she would be touching his upper shoulder.

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[1] According to Frost, J.S. moved to the Victim Witness Unit sometime during the last six months to one year before she left the Prosecutor's Office, and the prosecutor at trial represented that J.S. left that office in March 1997.

Frost testified to comments J.S. made about defendant:

> The one that is most prominent in my mind is that one particular day [Frost, Garron and Stephanie] were out on the porch having a cigarette. . . . [J.S.] was not a smoker. And she came outside and made reference, you know, made some comments about Stephanie making plans to go to Virginia to see her family and how she would have no problems going to see Andy while Stephanie was away.

With respect to other such comments by J.S., Frost testified:

> She was like always saying things like "if your wife's never around let me know. You know, I can take care of you."[2]
>
> . . . .
>
> And if she saw Andy coming into the office she was -- she was wherever Andy was whether it be on the porch or in the hallway or wherever.

Terry Seay, another co-worker of J.S. and Stephanie Garron, also testified at the pre-trial hearing.[3] She came back to work at the Prosecutor's Office in September 1992, after a maternity leave, and first met J.S. then. Seay was employed in that office until October 11,

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[2] The transcript of the hearing and the trial does not show quotation marks, which I have inserted where the context makes it clear that the witness was reporting the words of another.

[3] Seay left the prosecutor's office in October 1999 and worked in the law office of defendant's trial attorney until May 2000, leaving for another job several weeks before this trial.

1999 as a secretary in the sexual assault and special investigations unit. She described her observations of J.S.'s interactions with defendant as follows:

> There were times when Andy would come into the office. He would be in uniform. [J.S.] would go over to him and like give him a hug. And she would always be the first to initiate a conversation. She used to say that she liked a man in uniform. She used to comment on how lucky Steph was. Like she would go over to him and like put her arm on his arm, like put her hands on his arm and, you know, very . . . flirtatious.
>
> . . . .
>
> [S]he would just go over to him and just, you know, like "oh give me a hug," you know, like just go over and put her arms around him and hug him. . . . [u]p around his neck.

According to Seay, on J.S.'s last day in the prosecutor's office,

> she had made a comment that now she didn't have to work with Stephanie or see Stephanie that, you know, just to the point where she could flirt with him or whatever."

Seay could not place dates on her observations.

Neither Frost nor Seay was permitted to give the above-described testimony at the trial, and neither testified.

Mrs. Garron also testified at the pre-trial hearing. According to her, while she and J.S. both worked in the Grand Jury area of the prosecutor's office between 1992 and 1994, she observed [J.S.]

> [being] extremely flirtatious with Andy. . . . especially if he was in uniform she would really make a big deal over him and . . . always make comments to me about what you know she was going to take my husband and just that kind of stuff.

Defendant was present when J.S. made those comments.

> J.S. would always make sure she would touch his face, touch his arm, touch his chest. . . .
>
> [S]he would make it a point to say, "your husband's here, you're not paying any attention to him" and literally shove me away to – to give him a hug and squeeze on him, that type of thing. . . .
>
> [S]he would try to get it as full body contact as she could.

Mrs. Garron liked J.S., but J.S. "was outrageous." When defendant came by the office, J.S. would make comments like:

> "[Y]ou don't need to talk to her, Andy, you've got me . . . . [W]hat do you want with that scrawny white girl. You need somebody that you can grab a hold of." And even that wasn't a race thing at all that was just something that was joked about. But she constantly would give him a kiss, grab his arm, hold his hand, literally try to pull him away. . . .
>
> She liked him in uniform. There was always the comment, the standardized comment about "I love a man in uniform . . . ." "[I]s that your gun or are you happy to see me," those kind of remarks. . . . [S]he often

> would make comments along the lines of "you know, I'll take that man away from you if he spends just one night with me, Stephanie, I'll take that man away from you." . . .
>
> I do recall her saying that she wanted Andy for her 30th birthday present. "They don't make men like Andy anymore. Where did you find Andy." You know that kind of stuff.

The incident when Mrs. Garron confronted J.S. about touching her husband on the buttocks occurred sometime in 1995 or 1996. J.S. left the prosecutor's office in 1997, and it was on her last day there that "the good-bye kiss" occurred. When J.S. came inside after kissing defendant goodbye, she said "that is some man. That was some kiss. . . . [W]henever you need to get rid of him you just send him my way girlfriend."

But in front of the jury, Mrs. Garron's above-described testimony was limited. She was permitted to testify to only two of J.S.'s remarks about defendant. Mrs. Garron was allowed to tell the jury that after hearing that J.S.

> had grabbed my husband's rear end, which J.S. did not deny, J.S. "played it off as a joke [saying] that she was overwhelmed. That his butt was right there in front of her going up the stairs. And she just reached out and grabbed it.

Mrs. Garron was also allowed to testify that after the goodbye kiss, which took place outside Mrs. Garron's presence, J.S. told her: "'[Y]ou know, he's a great kisser.' And should I ever want to get rid of him please just send her – send him her way."

In the pretrial hearing, defendant testified to J.S.'s

prior conduct toward him when he visited his wife at the prosecutor's office.

> We became friendly. She would flirt with me often. Every time that I was there that she saw me she would flirt with me, come up give me a hug, talk to me about how I spoil my wife and she wanted someone like me because my wife didn't deserve all the things that she got. . . .
>
> She would come up and make a big production. She's rather well-endowed. And she would make a big production of that and she would reach up around my neck and pull me down and give me hug and brush herself against me.

According to defendant, she would brush by him in the hall,

> bat her eyes or flirt or just smiling, bump into me. As she was talking she liked to like rub my arm or touch my chest when she would speak to me. . . .
>
> She would use her chest area and her – her butt area.
>
> She would make comments that she would like to have a white man like me. . . . that I spoiled my wife, that I was too good to my wife, that I needed somebody like her, that my wife didn't treat me right."

On J.S.'s last day in the prosecutor's office, when defendant's wife was not present, J.S. kissed him goodbye and "it was a rather passionate kiss."

Once after J.S. had left her job at that office, defendant testified that he was responding to a comment

from J.S. when he asked: "'[W]hat are you ready to have an affair now[?]' And her response was 'now that I don't have to look at your wife anymore, you're damn right.' And I said, 'well, give me a call.'"

At trial, however, defendant himself was permitted to describe only three incidents involving prior physical contact with J.S.: the occasion when she grabbed his buttocks in the prosecutor's office. the "passionate" "French kiss" that she initiated and he returned on her last day at the prosecutor's office, and a hug and kiss she initiated after he helped her to avoid arrest on a warrant for an unpaid traffic violation. Defendant was not permitted to relay to the jury any of J.S.'s verbal overtures or other conduct toward him over the several years that J.S. was employed in the prosecutor's office.

Defendant contends, among other things, that the excluded evidence does not fall under the Rape Shield Law because J.S.'s remarks do not meet the definition of "sexual conduct" under *N.J.S.A.* 2C:14-7f. It is unnecessary to resolve that question because there was no basis for the exclusion under either the Rape Shield Law or otherwise.

The judge's rationale for distinguishing admissible from inadmissible evidence of conduct between J.S. and defendant was that J.S.'s merely "flirtatious" remarks and conduct were not relevant, and that defendant did not offer sufficiently detailed information, particularly with respect to the dates of such incidents. I disagree with both explanations. Defendant testified on his own behalf. The jury had to make a pure credibility determination – whether to believe J.S. or defendant, each of whom presented a diametrically different explanation for what occurred between them in the early morning hours of September 28, 1998, after J.S. voluntarily admitted defendant into her home.

Weighing the circumstances of the prior relationship between J.S. and defendant, most particularly the extent to

which she led him to believe, by word or deed, that she would welcome his sexual attentions, must have been a factor in each juror's determination that the State had proved beyond a reasonable doubt that defendant used physical force or coercion to accomplish the sex acts with J.S., that is, that J.S. did not consent and defendant had no reasonable belief that she consented. In order to avoid conviction on each offense as charged, defendant needed only to persuade one juror that there was reasonable doubt that he had a sincere and reasonable belief under all the circumstances that J.S. welcomed and consented to the sex acts. The jury heard about three incidents of physical contact which the judge deemed relevant, but the jury never heard substantial available evidence from several witnesses of J.S.'s explicit verbal invitations to defendant. And the jury heard only a fraction of the available evidence of J.S.'s expressed desires with respect to him, that coming from Mrs. Garron and not from the two independent witnesses. The excluded remarks were highly relevant and material to the delicate weighing process on the credibility of defendant and J.S. The entirety of J.S.'s remarks, if known to and believed by the jury, had the potential for creating reasonable doubt in the mind of at least one juror. To artificially distinguish past encounters between defendant and J.S. on the ground that some were "merely flirtatious" reflects a failure to appreciate the legitimate and compelling purpose for which the evidence was offered. Moreover, the precise dates of each comment were unnecessary to establishing threshold reliability, especially after the judge found that the one-year presumption of *N.J.S.A.* 2C:14-7b was overcome with respect to the incidents that were admitted.

Nothing in the case law supports the decision to exclude this evidence. In reviewing the evidentiary restrictions under the Rape Shield Law, the Court in *State v. Budis*, 125 N.J. 519, 532 (1991), explained the required analysis:

> [W]e must ascertain, apart from the Rape Shield Statute, whether the evidence was

> relevant to the defense. If the evidence is relevant, we then must decide whether its probative value outweighs its prejudicial effect. If so, the evidence may not constitutionally be excluded.
>
> [Citations omitted.]

See also State v. G.S., 278 N.J. Super. 151, 169 (App. Div. 1994) ("Pursuant to the Rape Shield statute, a court must determine first, whether the proffered evidence of a victim's sexual conduct is relevant, and second, whether the evidence is unduly prejudicial, confusing or invasive of the victim's privacy."), *rev'd on other grounds*, 145 N.J. 460 (1996).

The excluded evidence here was clearly relevant and had no potential for invading J.S.'s privacy, or for unduly prejudicing or confusing the jury so as to warrant its exclusion. *See N.J.R.E.* 403. There was simply no ground for exclusion. *Compare State v. Cuni*, 159 N.J. 584, 600-08 (1999) (minimal relevance outweighed); *State v. Rowe*, 316 N.J. Super. 425, 437 (App. Div. 1998) (proffer insufficient), certif. denied, 160 N.J. 89 (1999); *State v. Scherzer*, 301 N.J. Super. 363, 418 (App. Div.) (any error was harmless), certif. denied, 151 N.J. 466 (1997). I do not suggest that any single juror necessarily would have believed defendant's version of events had he or she heard the excluded testimony. But I see a reasonable possibility that the cumulative effect of all such testimony could have swayed at least one juror, and I see no countervailing purpose served by limiting this evidence.

II

The second reversible error in this trial was the failure to charge the jury on the lesser included offenses to aggravated sexual assault and aggravated criminal sexual contact. Admittedly, it was in response to defendant's last-minute request that the judge decided not to charge the jury on the lesser included offenses, that is, sexual assault,

N.J.S.A. 2C:14-2c(1), as a lesser included offense of aggravated sexual assault charged under *N.J.S.A.* 2C:14-2a(4) (count one); and criminal sexual conduct, *N.J.S.A.* 2C:14-3b, as a lesser included offense of aggravated criminal sexual conduct charged under *N.J.S.A.* 2C:14-3a (count two). On each count, the key question for the jury was the role, if any, of the defendant's duty weapon, which both he and J.S. said he removed and placed on a nearby dresser before engaging in a sex act with J.S.

The lesser included offenses on both counts were rationally supported by evidence that defendant's admitted acts of oral penetration and masturbation were committed by "physical force or coercion," but not by threat involving a weapon. Even if the jury believed that J.S. did not consent to defendant's conduct, the evidence easily supported the lesser charges, and could have led to acquittal on the greater charges. In fact, the only basis for conviction on the greater charges, each of which requires proof that defendant was "armed with a weapon . . . . and threaten[ing] by word or gesture to use the weapon," is that after defendant laid his gun on the dresser, J.S. saw a red light on the gun, apparently a sighting device, and she was frightened because she believed that the light meant that the gun was ready to be fired. There was no evidence whatsoever that defendant verbally threatened J.S. with the gun or that he physically did anything with it other than place it on a dresser top.

The case was tried both by the prosecution and the defense as if the jury would have the opportunity to consider the lesser included charges. As late as the charge conference on August 24, both sides agreed with the judge's stated intention to give the jury the lesser included charges. That same day, the State submitted a letter brief concurring with that decision. The next day, however, defense counsel submitted a letter brief reversing his previous position and for the first time requesting the judge *not* to give the lesser included charges. Obviously, that was a strategic decision on the part of the defense based on a perception (in this case, a misperception) that the jury

was more likely to acquit if the only charges before it required proof beyond a reasonable doubt that defendant was "armed with a weapon . . . and threaten[ed] by word or gesture to use the weapon."

The question of charging a jury on lesser included offenses has generally arisen in either of two contexts: where the defendant seeks the charge and the State objects, or where neither side requests the charge. Here the judge was faced with a more unusual situation. After agreeing to the lesser included charges at the charge conference, defense counsel changed his position and strongly urged against those charges.

A defendant is not entitled to lesser included charges pursuant to *N.J.S.A.* 2C:1-8e upon request unless there is a rational basis in the record for the jury to reject the greater charge and convict on the lesser. *See State v. Savage*, ___ N.J. ___, Docket No. A-57-01 (decided June 20, 2002) (reversing convictions for murder, conspiracy, and kidnapping for failure to charge the lesser included offense of criminal restraint, as requested by the defense)[4]; *State v. Brent*, 137 N.J. 107, 123 (1994) (reinstating first degree aggravated sexual assault and first degree kidnaping charges); *see also State v. Sloane*, 111 N.J. 293, 299 (1988); *State v. Viera*, 346 N.J. Super. 198, 211 (App. Div. 2001); *State v. Gaikwad*, 349 N.J. Super. 62, 78 (App. Div. 2002).

Although the principle of charging a jury on lesser included offenses was originally intended to protect the prosecution against an outright acquittal when a single element of the greater charge could not be proven, it has become an equally important protection for defendants, avoiding "the coercive prejudice inherent in giving the jury the choice of all-or-nothing." *State v. Lopez*, 160 N.J.

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[4] In *Savage*, the Court rejected the argument that the trial judge was required to give another lesser included charge *sua sponte*, because "the evidence did not clearly indicate or warrant such a charge." Slip op. at 34.

Super. 30, 36 (App. Div. 1978) (*citing State v. Christener*, 71 N.J. 55, 69-73 (1976)); *see also State v. Neal*, 229 N.J. Super. 28, 33 (App. Div. 1988) (convictions on unindicted charges reversed as not truly lesser included); *State v. Vujosevic*, 198 N.J. Super. 435, 445 (App. Div.) (conviction of aggravated manslaughter upheld, and harmless error to reject defendant's request for a lesser charge of aggravated assault, where jury had opportunity to convict on another lesser charge, reckless manslaughter), certif. denied, 101 N.J. 247 (1985), *habeas corpus granted sub nom. Vujosevic v. Rafferty*, 844 F.2d 1023 (3d Cir. 1988).[5] *See generally* Catherine L. Carpenter, *The All-or-Nothing Doctrine in Criminal Cases, Independent Trial Strategy or Gamesmanship Gone Awry?* 26 Am. J. Crim. L. 257 (1999).

Even where there has been no request by the defendant, it has been held reversible error to omit the lesser included charge where the lesser charge is rationally supported by the evidence. *State v. Robinson*, 136 N.J. 476, 489-91 (1994) (failure to instruct the jury on passion-provocation manslaughter as a lesser included offense was reversible error); *State v. Short*, 131 N.J. 47, 53 (1993) (lesser included charge required even where statute of limitations has run on that charge); *State v. Purnell*, 126 N.J. 518, 543 (1992) (murder conviction affirmed but death sentence reversed because jury was not charged on lesser included non-capital felony murder); *State v. Green*, 318 N.J. Super. 361, 375 (App. Div. 1999) (failure to give lesser included charge of simple assault as a lesser included offense of aggravated assault on a police officer is reversible error), *aff'd*, 163 N.J. 140 (2000); *State v.*

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[5] In *Vujosevic v. Rafferty*, 844 F.2d 1023, 1024 (3d Cir. 1988), the Third Circuit rejected the harmless error rationale for affirming the defendant's conviction. After Vujosevic's petition for habeas corpus relief was denied by the United States District Court, the Third Circuit reversed and remanded for habeas relief on the ground that the trial judge's refusal to instruct the jury on the lesser included offense of aggravated assault violated the defendant's rights under the fifth, sixth and fourteenth amendments of the United States Constitution and therefore constituted "prejudicial constitutional error." *Id.* at 1024.

Singleton, 290 N.J. Super. 336, 341-42 (App. Div. 1996) (failure to charge criminal trespass as a lesser included offense of burglary is reversible error); *State v. Gallagher*, 286 N.J. Super. 1, 13-14 (App. Div. 1995) (lesser included offenses to aggravated sexual assault should have been charged, and conviction on the greater charge is reversed), certif. denied, 146 N.J. 569 (1996); *State v. Clarke*, 198 N.J. Super. 219, 225-26 (App. Div. 1985) (failure to charge jury on criminal mischief as a lesser included offense of attempted burglary was reversible error).

The more difficult question posed by this case, which I have not found directly addressed by our case law, is whether a lesser included offense must be charged even over a defendant's objection. The majority relies upon *State v. Perry*, 124 N.J. 128, 158 (1991) (the omitted lesser included charges would have been in direct conflict with defendant's argument that he was not at the scene of the crime), and *State v. Choice*, 98 N.J. 295, 300 (1985) (the case was not tried on the theory of passion-provocation, and to have given the charge would have surprised both the State and the defense). In each of those cases, the Court upheld a murder conviction and rejected the defendant's contention on appeal that the trial judge's failure to charge passion-provocation (and in the case of *Perry*, self-defense) *sua sponte* was reversible error. Those cases are distinguishable.

In *Perry*, there was no evidence to support either the lesser manslaughter charge or self-defense, and to have charged the jury on either would have conflicted directly with the defense's argument that "the State had not proven its case that defendant was present or participated in any way in the death." 124 N.J. at 163. In *Choice*, the defendant presented an alibi defense at trial, but on appeal cited failure to give a lesser included manslaughter charge *sua sponte*.

The Court in *Perry* cited *Choice* for the proposition that:

> Trial courts must carefully refrain from preempting defense counsel's strategic and tactical decisions and possibly prejudicing defendant's chance of acquittal. The public interest, while important, may not overwhelm defendant's interest in pursuing a legitimate defense in the complex setting of a criminal trial.
>
> [124 N.J. at 162-63.]

As the Court noted in *Choice*, 98 N.J. at 300, and repeated in *Perry*, "a trial court must be sensitive to the potential that charging lesser-included offenses could prejudice a defense to the more serious charges" and must avoid making conviction of the greater charge more likely. 124 N.J. at 163-64. That is not this case. The Court's emphasis on deference to defense counsel's strategy in *Perry* and in *Choice* is inapplicable to the case before us, where neither factual inconsistency nor surprise would have prejudiced defendant, and there was no reasonable likelihood that offering the jury the lesser charges would have increased the likelihood of conviction on the greater charges.

I would hold that in circumstances like those before us, a defendant is not entitled to make the all-or-nothing choice. The only limitation I would find on the trial judge's obligation to give a rationally supported lesser included charge is that it not "assure conviction" of the greater charge. *Choice*, 98 N.J. at 301; *Perry*, 124 N.J. at 164. It is not a defendant's right to avoid conviction on proven but lesser charges just because the State may have failed to prove the greater charge. Understandably, Judge Ridgeway was in the unenviable position of addressing a last-minute change of mind by the defense. Nevertheless, although the trial judge has an obligation to preserve a defendant's rights, the judge has an even higher obligation to see that the charges are fairly and appropriately resolved.

As the Court explained in *State v. Powell*, 84 N.J.

305, 319 (1980), and restated in *Choice*, "the interests of the parties - prosecution and defense - as reflected in the decisions of their counsel were not the only interests involved in a criminal matter; that the public interest, especially in a criminal case, may go well beyond the interests of the parties." 98 N.J. at 301. Powell was a pre-Code case in which the Court reversed a second-degree murder conviction for failure to give a lesser included charge on voluntary manslaughter - passion/provocation - which could have been supported by the evidence. In *Powell*, the defense had willingly placed several inconsistent theories before the jury: alibi, accident, self-defense (each of which was charged), and passion/provocation.

The decision to give or withhold a lesser included charge when a defendant objects is particularly fact-sensitive, as recognized by the Court in *Powell*. There Chief Justice Wilentz wrote respecting the obligation to give a manslaughter instruction: "there are no legal rules as to what inferences may be drawn [to support the lesser offense from the proofs in the case]. The question is one of logic and common sense." 84 N.J. at 314.

The majority agrees that the record provides a rational basis for the lesser included charges but concludes that defendant's objection to giving the jury those charges is determinative. The question is whether defense counsel's strategy here constituted invited error from which no appeal should be allowed. The doctrine of invited error is intended to avoid allowing a party to urge one course of action upon the court and then to claim error in adopting that very course of action when the outcome is unsatisfactory. *See, e.g.*, *State v. Loftin*, 146 N.J. 295, 336-37 (1996); *see also State v. Marshall*, 123 N.J. 1, 93 (1991), cert. denied, 507 U.S. 929, 113 S. Ct. 1306, 122 L. Ed. 2d 694 (1993); *State v. Ramseur*, 106 N.J. 123, 281-82 (1987). In *Marshall* and *Ramseur*, the Supreme Court refused to vacate capital murder convictions on each defendant's contention that his attorney's strategic decision deprived him of a fair trial. But the circumstances are

different here. Respect for a defendant's autonomy and his right to choose his path at trial neither requires nor permits the trial judge to abdicate her/his role of insuring a fair trial. The evidence adduced at this trial permitted the jury to find that even if the sex acts were forced upon J.S., the weapon played no part. The jury did not have that option, and it should have.

Our courts are appropriately reluctant to interfere with a defendant's trial strategy, all the more so because it is the defendant who will bear the consequences of the outcome. *See, e.g., Perry*, 124 N.J. at 162-64; *Choice*, 98 N.J. at 300. A criminal trial is neither a chess game nor a game of chance to be played on a winner-take-all basis. It is, after all, a search for the truth, in which the judge has the final responsibility to insure that every trial is a fair trial - fair to the defendant, to the State, and to the public at large. In the context of the evidence adduced in this case, it was a gross miscarriage of justice to withhold the lesser included charges from the jury's consideration.

The evidence concerning defendant's weapon was so attenuated as arguably to have been insufficient to support the essential element of the aggravated offenses charged: that "[t]he actor [was] armed with a weapon . . . and threaten[ed] by word or gesture to use the weapon." *N.J.S.A.* 2C:14-2a(4); *N.J.S.A.* 2C:14-3a. Assuming that the jury was convinced that J.S. did not voluntarily participate in the sexual conduct perpetrated by defendant, and further assuming that such conduct, if forced upon her by a police officer while on duty was particularly reprehensible, nevertheless common sense tells us that there was good reason for defendant to remove his duty weapon before engaging in any sex act, voluntary or otherwise, whatever the other circumstances. J.S. never described any threatening "word or gesture" by defendant involving the weapon, other than its presence on a table top, with a red light leading her to believe that it "might go off." The omission of the lesser included charges was "clearly capable of producing an unjust result" in this case and therefore constitutes plain error requiring reversal. *See R.*

2:10-2.

The words of the Chief Justice in *Powell* have not been weakened by the specific exceptions noted in *Perry* and in *Choice* and are equally applicable to the case before us today:

> [W]e question whether it is proper for the trial court to omit such a charge simply because defense counsel specifically requests that it not be given, even where the prosecution concurs in that request. If that agreement between counsel reflects their belief that there is insufficient evidence to warrant such a charge, that is one thing: certainly a trial court would seriously consider counsel's concurrence as indicating a high degree of probability that there is indeed insufficient evidence. Where, however, counsel's concurrence that no such charge be given, in the face of obvious record support for such charge, is based on their conclusions as to optimum strategy (defense counsel believing that the charge will impede what is believed to be a substantial chance of acquittal, the prosecution that it will impede what it believes to be a substantial chance of conviction of first or second degree murder) the manslaughter charge should be given to the jury. There is a third party involved (represented by the jury): the State itself, on behalf of its citizens. Their interest is paramount, even more important than preserving the "purity" of the adversary system, especially when there seems to be no justifiable end served by that system in this particular situation. Very simply, where the facts on the record would justify a conviction of a certain charge, the people of this State are entitled to have that charge rendered to

> the jury, and no one's strategy, or assumed (even real) advantage can take precedence over that public interest. It matters not that the defendant's counsel may be correct in the belief that acquittal is more likely without such charge, or that defendant himself is willing to take that chance; nor does it matter that the prosecutor is content to forego the manslaughter instruction in the hope that a conviction of murder will result. The judge is more than a referee between contestants. He is the law's representative, and it is his duty to see that the will of the law is done. The real function of the adversary system is to help him fulfill that duty.

[84 N.J. at 318-19.]

In sum, each of two errors had the potential for affecting this verdict. In the first instance, the jury could have had reasonable doubt that any crime was committed. In the second instance, the jury could have had reasonable doubt that the most serious crimes, involving use of a weapon, were committed. If given the opportunity to acquit on those charges but to convict on the lesser included offenses supported by the evidence, the jury well might have done so. On the basis of either error I would vacate defendant's convictions and order a new trial. Together, these errors surely warrant reversal and a new trial. *See State v. Orecchio*, 16 N.J. 125, 129 (1954); *State v. Sexton*, 311 N.J. Super. 70, 87 (App. Div. 1998), *aff'd*, 160 N.J. 93 (1999); *State v. Allen*, 308 N.J. Super. 421, 431 (App. Div. 1998).

Rushton H. Ridgway
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Re: State v. Anderson Garron
Ind. No. 99-07-00134S

Dear Counselors:

This letter represents the Court's opinion regarding the defendant, Anderson Garron's motion seeking to admit evidence pursuant to *N.J.S.A.* 2C:14-7 of prior sexual contact between himself and the victim, J.S. The Rape Shield Statute, which is codified in N.J.S.A. 2C:14-7 generally precludes evidence of a sexual assault victims's prior sexual conduct. *See N.J.S.A.* 2C:14-7a. However, under certain circumstances, such evidence is admissible. The statute provides that, "[e]vidence of the victim's previous sexual conduct with the defendant shall be considered relevant if it is probative of whether a reasonable person, knowing that the defendant knew at the time of the alleged offense, would have believed that the alleged victim freely and affirmatively permitted the sexual behavior complained of in *N.J.S.A.* 2C:14-7d.

The defendant aruges that the sexual conduct between himself and J.S. is admissible under *N.J.S.A.* 2C:14-7d. He further contends that the one year limitation set forth in *N.J.S.A.* 2C:14-7b is only a presumption, and that he has provided evidence overcoming that presumption. The State refutes the defendant's claim, stating that the prior sexual conduct between the defendant and J.S. is not relevant, considering the defendant denied a prior sexual relationship with J.S. during his testimony before the Grand Jury. The State also argues that any sexual conduct between the defendant and J.S. that occurred more than one year prior to the sexual assault is presumptively excluded by the statute absent clear and convincing evidence to the contrary.

After considering the testimony of the witnesses, the briefs submitted and oral argument by both parties, the Court will allow the defendant the opportunity to introduce evidence of J.S. allegedly grabbing the defendant's buttocks and the allegation of the two passionate kisses that occurred between J.S. and the defendant.

Hearings were conducted before this Court on June 12 and June 15, 2000, where testimony was taken from five witnesses, including the defendant, with regards to the prior sexual conduct between the defendant and J.S.. During the hearings the defendant sought to admit the following information as evidence of prior sexual conduct between himself and J.S.: 1) That J.S. has on unspecified occasions asked the defendant to drive her to work when she was employed by the Cumberland County Prosecutor's Office; 2) That J.S., on unspecified occasions while working at the Cumberland County Prosecutor's Office, flirted with the defendant by touching him, hugging him and brushing up against him; 3) That while J.S. worked at the Cumberland County Prosecutor's Office she made statements to the defendant that she was "gonna get that man" and that she "needed a man like that" and that the defendant was "too good" for his wife; 4) That while J.S. worked at the

Cumberland County Prosecutor's Office she grabbed the defendant's buttocks; 5) That on the last day that J.S. worked for the Cumberland County Prosecutor's Office in March of 1997, she forced herself on the defendant and kissed him in a provocative manner; 6) That after J.S. had stopped working for the Cumberland County Prosecutor's Office, she approached the defendant while he was on the front porch of the Prosecutor's Office and stated that she was ready to have an affair with the defendant now that she no longer had to see the defendant's wife everyday; 7) That on an occasion in 1998 when J.S. met with the defendant at the Bridgeton Police Department to take of a motor vehicle warrant, J.S. forced herself on the defendant and kissed him in a provocative manner; 8) That during the sexual assault at issue in this case, the victim forced herself on the defendant and kissed him in a provocative manner.

The defendant offered the testimony of Wendy Frost, Terri Seay, Stephanie Garron, Barbara Carney and himself to support the admission of this evidence. The testimony revealed that, with the exception of the defendant, each of the witnesses worked with the victim, J.S., while she was employed by the Cumberland County Prosecutor's Office between September of 1992 and March of 1997. Each of these witnesses was in the past or is currently employed by the Cumberland County Prosecutor's Office. The defendant in his testimony stated that he became familiar with J.S. while he was employed as a Bridgeton Police Officer and would visit his wife, Stephanie Garron, at the Prosecutor's Office. Eah of the witnesses, with the exception of Barbara Carney, testified that the defendant and J.S. engaged in flirtatious conduct and that such conduct was initiated by J.S. The witnesses' also testified to flirtatious statements made by J.S. to the defendant. Barbara Carney however, could not recall any sexual or flirtatious contact, nor any flirtatious statements between the defendant and J.S.

The defendant, testifying on his own behalf, alleged that some time between 1995 and 1996 he was visiting his wife at the Prosecutor's Office. As he walked up a flight of stairs in the office, J.S. grabbed his buttocks. Stephanie Garron further testified that after she heard J.S. had grabbed her husband's buttocks, she confronted J.S. and advised her not to do it again. The defendant also testified that on the victim's last day of work or some time during the victim's last week of work in March of 1997 he was visiting his wife, Stephanie Garron at the Prosecutor's Office. While out on the Prosecutor's Office porch the defendant's wife commented that it was J.S.'s last day of work, so the defendant should give J.S. a kiss good-bye. After the defendant's wife returned to the office, J.S. pulled the defendant to the side of the building and passionately kissed him. On another occasion in July of 1998, after J.S. had left the Prosecutor's Office, the defendant who was employed as a Bridgeton Police Officer became aware that J.S. had a warrant due to an unpaid traffic ticket. The defendant went to J.S.'s home on two separate dates, advised J.S. of the warrant and told her to pay the ticket or risk being arrested. J.S. subsequently went to the Bridgeton Police Department to pay the fine. While there, J.S. pulled the defendant into a room and again gave him a passionate kiss. The remaining testimony by Frost, Seay, Garron and the defendant was consistent with the aforementioned evidence the defendant seeks to have admitted.

When applying the Rape Shield Statute a court must "review whether the evidence [is] relevant and highly material to the defense and whether its probative value outweighs its prejudicial effect." *State v. Clowney*, 299 N.J.Super. 1, 15 (App. Div. 1997), *citing*, *State v. Budis*, 125 N.J. 519, 532 (1991). Relevant evidence is evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action. *N.J.R.E.* 401. Relevancy is composed of two partsL probative value and materiality. *State v. Hutchins*, 241 N.J.Super. 353, 359

(App. Div. 1990). "Probative value concerns the tendency of evidence to establish the proposition that it is offered to prove." *Ibid.State v. Millett*, 272 N.J. Super. 68, 88 (App. Div. 1994). "Materiality concerns the relation between the propositions for which the evidence is offered and the issues in the case. *Ibid.*

In the instant case, the defendant offers the evidence of prior sexual conduct between himself and J.S. to prove that on the date of the alleged sexual assault, J.S. consented to the sexual conduct. The Court finds however, that the only three instances of sexual conduct, specifically, the alleged grabbing of the defendant's buttocks, and the two alleged passionate kisses is relevant to show that J.S. consented to the sexual conduct. The remaining evidence the defendant seeks to have admitted is merely flirtatious conduct, not sexual conduct. In fact, each witness, including the defendant's wife, made it clear that the conduct and statements between the defendant and J.S. was "flirtatious" and that such conduct was "taken lightly." Such flirtatious conduct is not probative of whether a reasonable person would have believed that J.S. freely and affirmatively consented to the sexual conduct on September 28, 1998.

However, evidence of J.S.'s grabbing of the defendant's buttocks and the two passionate kisses between J.S. and the defendant, in the Court's opinion could cause a reasonable person, who was involved in those prior incidents to believe that J.S. freely consented to the sexual conduct on September 28, 1997. Moreover, absent such evidence, a jury would be lead to believe there was no sexual conduct between the defendant and J.S. prior to the date of the alleged sexual assault. The prior sexual conduct is highly probative and material of whether J.S. consented to the sexual conduct on the day in question.

The State argues that the evidence the defendant seeks to admit is barred by *N.J.S.A.* 2C:147b, which states, "[i]n the

absence of clear and convincing proof to the contrary, evidence of the victim's sexual conduct occurring more than one year before the date of the offense charged is presumed to be inadmissible". The State contends that since the alleged sexual assault occurred on September 28, 1998, any evidence of sexual conduct of the victim prior to September 28, 1997 is barred. Section (b) however creates a presumption of exclusion, not absolute exclusion of sexual conduct more than one year prior to the alleged offense. The defendant has offered clear and convincing proof of prior sexual conduct that overcomes the presumption against the admission sexual conduct of the victim more than one year prior to the alleged incident. The Court agrees with the defendant's position that although the three incidents of sexual conduct occurred prior to the one year limitation, the evidence the defendant intends to offer shows a continuing course of conduct on the part of J.S. to engage in sexual conduct with the defendant. In the Court's opinion, the defendant has overcome the presumption.

Finally, with the exception of the three incidents the Court will admit, the other evidence the defendant seeks to admit is excluded because if offers limited detailed information of the alleged prior sexual conduct. The defendant's failure to offer specific detailed information precludes the admission of such evidence. *State v. Rowe*, 316 N.J. Super. 425 (App. Div. 1998). In *Rowe*, the court addressed the need for a defendant to provide specific information when seeking to admit evidence of a victim's previous sexual conduct under the Rape Shield Law. The court stated that "[a] defendant seeking to establish consent by introducing previous sexual relations with the victim should, whenever possible, certify in writing with reasonable specificity when, where, and under what circumstances the prior acts occurred. . . *Id.* at 436.

Here, the testimony and certifications merely consisted of vague statements of alleged sexual conduct, such as

hugging and flirting between the defendant and J.S. that occurred at the Prosecutor's Office. No witness could testify when such contact occurred, only that the contact occurred while J.S. was working at the Prosecutor's Office from September of 1992 to March of 1997, a five year period. The defendant's testimony however on the three specific incidents of sexual conduct, did provide specific detailed information of when, where and under what circumstances the sexual conduct occurred with regard to the victim's alleged grabbing of the defendant's buttocks and the two passionate kisses.

For the foregoing reasons the Court will allow the defendant to introduce at trial evidence of the three specific incidents of sexual conduct. The evidence is limited to the grabbing of the defendant's buttocks and the two passionate kisses. All other evidence of alleged sexual conduct between the defendant and J.S. is excluded. Mr. Morris will prepare the appropriate order.

Very truly yours,

Rushton H. Ridgway, J.S.C.

N.J. Stat. Ann. 2C:14-7

a. In prosecutions for aggravated sexual assault, sexual assault, aggravated criminal sexual contact, criminal sexual contact, endangering the welfare of a child in violation of N.J.S.A. 2C:24-4 or the fourth degree crime of lewdness in violation of subsection b. of N.J.S.A. 2C:14-4, evidence of the victim's previous sexual conduct shall not be admitted nor reference made to it in the presence of the jury except as provided in this section. When the defendant seeks to admit such evidence for any purpose, the defendant must apply for an order of the court before the trial or preliminary hearing, except that the court may allow the motion to be made during trial if the court determines that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence. After the application is made, the court shall conduct a hearing in camera to determine the admissibility of the evidence. If the court finds that evidence offered by the defendant regarding the sexual conduct of the victim is relevant and highly material and meets the requirements of subsections c. and d. of this section and that the probative value of the evidence offered substantially outweighs its collateral nature or the probability that its admission will create undue prejudice, confusion of the issues, or unwarranted invasion of the privacy of the victim, the court shall enter an order setting forth with specificity what evidence may be introduced and the nature of the questions which shall be permitted, and the reasons why the court finds that such evidence satisfies the standards contained in this section. The defendant may then offer evidence under the order of the court.

b. In the absence of clear and convincing proof to the contrary, evidence of the victim's sexual conduct occurring more than one year before the date of the offense charged is

presumed to be inadmissible under this section.

c. Evidence of previous sexual conduct with persons other than the defendant which is offered by any lay or expert witness shall not be considered relevant unless it is material to proving the source of semen, pregnancy or disease.

d. Evidence of the victim's previous sexual conduct with the defendant shall be considered relevant if it is probative of whether a reasonable person, knowing what the defendant knew at the time of the alleged offense, would have believed that the alleged victim freely and affirmatively permitted the sexual behavior complained of.

e. Evidence of the manner in which the victim was dressed at the time an offense was committed shall not be admitted unless such evidence is determined by the court to be relevant and admissible in the interest of justice, after an offer of proof by the proponent of such evidence outside the hearing of the jury or at such hearing as the court may require, and a statement by the court of its findings of fact essential to its determination. A statement by the court of its findings shall also be included in the record.

f. For the purposes of this section, "sexual conduct" shall mean any conduct or behavior relating to sexual activities of the victim, including but not limited to previous or subsequent experience of sexual penetration or sexual contact, use of contraceptives, sexual activities reflected in gynecological records, living arrangement and life style.

ASSEMBLY JUDICIARY, LAW AND PUBLIC SAFETY COMMITTEE

STATEMENT TO

ASSEMBLY, No. 677

with committee amendments

STATE OF NEW JERSEY

DATED: JANUARY 20, 1994

The Assembly Judiciary, Law and Public Safety Committee reports favorably and with committee amendments Assembly Bill No. 677.

This bill would amend the "Rape Shield Law," N.J.S. 2C:14-7, to strengthen the privacy protections granted to sex crime victims.

Although the "Rape Shield Law" currently places restrictions on a defendant's ability to introduce evidence of the rape victim's past sexual conduct, these restrictions fall short of protecting the victim's right to privacy. The inadequacy of the current Rape Shield provisions was borne out by events at the recent Glen Ridge sexual assault trial, in which the defendants were allowed to bring in evidence of the developmentally disabled victim's past history and discuss it, in great detail, in open court.

It is vitally important to assure rape victims that they will not themselves be put on trial if they press charges against their attackers. This bill is intended to strike an appropriate balance between protecting a defendant's constitutional rights, and protecting a rape victim from an assault upon the victim's character. It is in the public interest to protect the privacy of the victim, as opposed to allowing the defendant

to freely examine the victim's past when the examination serves no material or relevant evidentiary or constitutional purpose.

The bill would provide that evidence of the victim's previous sexual conduct with persons other than the defendant would not be admissible unless it is material to proving the source of semen, pregnancy, or disease. Currently, evidence of the victim's previous sexual conduct is admissible if it is material to "negating the element of force or coercion." Thus, under current law, a defendant may bring in evidence of a victim's past sexual conduct with another person in an attempt to show that the victim consented to the *defendant's own sexual* conduct.

The bill tightens the standard by which the court may, in its discretion, admit some evidence of the victim's past conduct. Currently, the evidence may be allowed if the court finds it relevant and finds that its probative value is not outweighed by its collateral nature or the probability that the evidence will create undue prejudice, confusion of the issues, or unwarranted invasion of the privacy of the victim. Under this bill, the court would be required to find that the evidence is highly material, in addition to being relevant, and that its probative value substantially outweighs its collateral nature or the probability for prejudice, confusion, or invasion of privacy.

The bill also provides that evidence of the defendant's previous sexual conduct with the victim would be relevant only if the previous sexual conduct with the victim could lead the defendant to reasonably believe that the sexual conduct complained of occurred with what a reasonable person would believe to be affirmative and freely given permission. This language is modeled on that used by the New Jersey Supreme Court in *State in Interest of M.T.S.*, 129 N. J. 422 (1992), where the Court held that a person is guilty of sexual assault if the person commits an act of

sexual penetration "in the absence of what a reasonable person would believe to be affirmative and freely-given permission to the act."

In addition, the bill provides that the Rape Shield statute is applicable when a defendant is charged with the fourth degree crime of lewdness committed in the presence of a child under the age of 13 or in the presence of a mentally disabled person.

Finally, the bill provides that a victim's gynecological records are excludable under the Rape Shield statute.

This bill was prefiled for introduction in the 1994 session pending technical review. As reported, the bill includes the changes required by technical review which has been performed.

MEETING
of
ASSEMBLY ADVISORY COUNCIL ON WOMEN

ASSEMBLY BILL NO. 677
(Amends the "Rape Shield Law" to exclude certain evidence concerning the victim's past sexual conduct.)

ASSEMBLY BILL NO. 1367
(Establishes central registry of domestic violence orders for use in evaluating firearm permit applications.)

ASSEMBLY BILL NO. 1368
(Restricts purchase of firearms by anyone who has been the subject of a domestic violence restraining order; requires police to seize weapons at the scene of domestic violence incidents.)

LOCATION: L'Hommideu Hall
Middlesex County College
Edison, New Jersey

DATE: April 29, 1994
1:00 p.m.

MEMBERS OF ADVISORY COUNCIL PRESENT:

Assemblywoman Rose M. Heck, Chairperson
Assemblywoman Joanna M. Gregory-Scocchi, Vice-Chair
Assemblywoman Loretta Weinberg

ALSO PRESENT:

Norma Svedosh
Office of Legislative Services
Aide, Assembly Advisory Council on Women

ASSEMBLYWOMAN ROSE M. HECK (Chairperson):

C[illegible]l morning everyone. We were waiting for two of our members to arrive, but apparently, they've either been detained or they're lost in one of those many parking lots out there. But we have chosen to begin. You've been very patient.

I would like to introduce to you our Vice-Chairwoman Joanna -- has the the first bill which we will be addressing today. Norma Svedosh is our OLS staff member, and Kathy Glynn is from the Assembly Majority Office. We have staffers in the audience. Do you want to introduce yours?

ASSEMBLYWOMAN GREGORY-SCOCCHI:

Sure. Barbara Horl, my Legislative Aide; and Mary Jen Beach, she's our new, press agent.

ASSEMBLYWOMAN HECK:

Suzie Chichester, who helped me initiate the entire idea for the Advisory Council on Women, who is one of my aides, is in the audience, also, and takes a very active role in everything we do.

As you noticed, we have three bills on the agenda today. I think you want to open with your statement, Joanna?

ASSEMBLYWOMAN GREGORY-SCOCCHI:

Yes, sure, sure.

Good afternoon, my name is Assemblywoman Joanna Gregory-Scocchi. I'm theVice-Chairwoman of this Assembly Advisory Council on Women.

I'd like to thank the Chairwoman of this Advisory Council, Assemblywoman Rose Heck, for the leadership, guidance, and support that she has provided this Committee. It's my distinct pleasure and honor to be able to work with Assemblywoman Heck and the other distinguished members of this Council, who continue to recognize the many needs of women and who address these issues through legislation.

I would also like to thank Assemblywoman Heck for being generous enough to have this meeting in the 18th District, my home District, at the Middlesex County Community College, where so many positive things related to women and women's issues take place. I want to thank all of you for attending this very important meeting today.

I am very, very proud to be able to continue the work of my mentor and my predecessor, Harriet Derman, who first introduced this Rape Shield bill. This bill addresses one of the most important issues any woman who has endured the violence and humiliation of rape has ever had to face. It is to put a stop to facing even more humiliation on the witness stand.

For too long, we have treated those victims in court as if they were the criminals. Harriet, as well as I, and many others I am sure, felt outraged in reading daily reports of the Glen Ridge rape case, in which a young woman was violated by not one, but by four young men. The defense attorneys used the young woman's past sexual history as evidence to confuse the jury, making it look like the woman was consenting to and even pursuing sex.

The tremendous injustice done to this woman has caused Harriet to reach out to Christine McGoey, who you

will hear from today, a member of the Essex County Chapter of NOW. Harriet even met with Chris on a holiday, I'm told, because it was the only day that court wasn't in session, and NOW -- National Organization of Women -- would not miss one day of testimony in the monitoring of this case.

The rage that Harriet and many others felt -- the way the victim's sexual history was portrayed -- spilt over to other parties, and in a joint effort of advocates for women's equality, this legislation was born, this Rape Shield bill, to prevent what happened to the Glen Ridge woman from ever happening again in any courtroom in New Jersey.

Please do not think that this legislation does not effect you. It affects each and every one of us. It affects the mothers, the grandmothers, the sisters, the wives, and the daughters of everyone in our families. When one woman is violated, we're all violated, men and women alike. When we are violated again by a system that is meant to protect us and should encourage us to come forward and punish the guilty party, but we do not, for fear of what we'll face in the witness stand, it is a travesty of justice.

It is my hope that not any one of our family members or even ourselves are ever up there on that witness stand. But should that ever happen, we cannot allow our loved ones to be violated once again. I urge the members of this Committee to join in my efforts and support this legislation to amend the Rape Shield bill.

Thank you.

ASSEMBLYWOMAN HECK:

Thank you, Joanna.

I know Harriet was very taken with this particular bill -- the need for it -- and wanted it to move through last year's session. It went through the Assembly, it's my understanding, but that's stuck on the other side, in the Senate.

ASSEMBLYWOMAN GREGORY-SCOCCHI:

Yes.

ASSEMBLYWOMAN HECK:

So I hope you're more successful. Do you have a--

ASSEMBLYWOMAN GREGORY- SCOCCHI:

We're going to push it through.

ASSEMBLYWOMAN HECK:

--a Senate champion. Did you choose --

ASSEMBLYWOMAN GREGORY- SCOCCHI:

Yes. We actually have writtten to Senator Gormley to ask him to post this bill as soon possible.

ASSEMBLYWOMAN HECK:

But do we have a Senator who is--

ASSEMBLYWOMAN GREGORY-SCOCCHI:

Yes, Senator Jack Sinagra.

ASSEMBLYWOMAN HECK:

He is definitely-- Okay.

ASSEMBLYWOMAN GREGORY-SCOCCHI:

Of course, from my district -- will help assist us in these efforts.

ASSEMBLYWOMAN HECK:

That's very important that you get some action going on that side, too.

ASSEMBLYWOMAN GREGORY-SCOCCHI:

Yes.

ASSEMBLYWOMAN HECK:

Because we lost a lot of our bills as they went over to the other side, unfortunately.

ASSEMBLYWOMAN GREGORY-SCOCCHI:

Well, hopefully--

ASSEMBLYWOMAN HECK:

But we have to educate the Senate side, as well.

ASSEMBLYWOMAN GREGORY-SCOCCHI:

Rose, with your help and the help of this Council and all the other people in Trenton, I feel confident that we can get it done.

ASSEMBLYWOMAN HECK:

Very good.

One of the reasons we hold these types of meetings are to look at every facet of the bill that is being presented and here arguments either for or against, or, if there are areas that need beefing up, so to speak, before it goes to a standing committee for action. We prefer to see the bills improved to the degree that will lend itself to passage out of a committee and then on to the Assembly floor. This is not an exercise. This is certainly an earnest procedure to make certain that these bills pass. There is a need, we all know that. I think the public at large is beginning to understand the seriousness of all of these interacting proposed laws.

We do have some laws that are working, which are on the books, but have found that there are victims out there who need some support. Harriet and Joanna have taken up that particular fight for those crime victims. I am very proud to have Joanna as Vice-Chair of this Committee. I think she's a marvelous person.

We do have several people here to speak, and I'm looking at this particular printout, but we do have Christine McGoey from Essex County NOW, who has another appointment, I believe. If you'd like to come forward.

CHRISTINE SHAACK McGOEY:

Good Afternoon. Is this on? The middle one?

Good afternoon, I'd like to thank the Committee for holding this hearing on this very important subject, a topic that is so important to the women of the State. I would also like to thank you for giving me an opportunity to give you my thoughts on this particular piece of legislation.

I would like to put this bill a little bit in context. I think one of the things that we all have known as women, most of us experience in our daily lives thing that we do to accommodate ourselves, things that we do to avoid situations in which we might get raped.

Recent studies have confirmed that women will go out of their way, because of this fear of rape. We monitor: when we go out at night, where we choose to walk and with whom, where we choose to park our cars. This is a real fear that women have, and, when we look at the statistics on rape in this country, we can really feel the depth of this fear, because the statistics are staggering.

Recently, in connection with the Violence Against Women Act at the Federal level, the Senate took testimony. The Senate was told in those hearings that approximately two million women will be raped in this country this year. The FBI itself has estimated that one out of every three women will be raped. So, when we are looking at the topic of rape, we are not looking at it in a vacuum. This is a crime that many, many of us will face and have to deal with on a personal level.

Beginning in October 1992, women in this State had another reason to be thinking about rape when opening arguments, in what came to be known as the Glen Ridge rape trial, started. As you probably recall during that trial, four from a gang of thirteen male athletes faced charges of raping

a 17-year old retarded girl with a baseball bat, a broom handle, and a stick. Although the jury ultimately convicted three of the four men on first-degree rape and other charges, when women in New Jersey speak about the trial, they don't mention the outcome. Instead they tell about their shock and their disillusionment, the anger they felt, as day after day, for nearly six months, the defense was allowed to put the victim on trial by resurrecting the old myths and stereotypes about rape.

The Glen Ridge trial has shaken women's belief that rape victims will be treated fairly in New Jersey's courts. In short, the trial has created a crisis in confidence.

As one legal commentator recently explained, "When the prosecution of rape incorporates rape myths, it promotes sex discrimination and undermines women's confidence in the legal system. Women, more than one-half of the population, cannot believe in a legal system that operates to continue their historic subordination."

As an attorney and a representative for Essex County NOW, I observed the Glen Ridge trial on a daily basis with my colleague Carol Vasile, who is also sitting here in the room. With the women of New Jersey, Ms. Vasile and I watched as the defense was allowed to portray the Glen Ridge victim as a dangerous and sinister temptress.

As taken from our daily notes and certain trial transcripts, the defense charged that the victim was -- and I want to stress to you that these are all quotes that I've pulled from those sources -- was a "full breasted, devious, sexually aggressive Lolita with a full knowledge of sex -- a long history before this incident -- who was ready, willing, able and anxious to be assaulted -- who would do it again, who

desired to perform these acts." "What did you do, Defense Attorney Michael Querques asked the victim's mother, to protect the young males, in the event that they touched her?"

Witnesses were asked about every detail of the victim's private life: Did she ever talk about boys, about sex? Did she swear, smoke, drink, or display any other immoral behavior? Couldn't it be that the victim initiated the perverse sexual assault because she was acting out against a strong mother figure? When did her breasts begin to develop? How large did they become? Boys were magnetized to her breasts, weren't they?

And in typical "Did you ever hear that" or "Isn't it true that" form, defense counsel continually insinuated that the victim had engaged in numerous prior acts of "sexual misconduct."

New Jersey's Rape Shield Law, as interpreted by Judge Benjamin Cohen, did not prevent these types of questions, nor did it stop the defense from plumbing the victim's medical, psychological, and gynecological records and arguing that the victim's use of birth control pills proved promiscuity. And I wanted to have in the record here that the victim's mother had to testify that the victim's -- the birth control was put in the victim's food without her knowledge, after the mother became aware that the victim was very vulnerable because of her mental disability to the threat of rape.

During and after the trial, Ms. Vasile and I spoke with hundreds of women in this State who were all asking the same question: If New Jersey's Rape Shield Law could not prevent "unchastity" based attacks on a young, vulnerable retarded victim, who had been gang raped with implements, how could

it prevent such biased attacks on them? As a woman who called me seeking advice for her daughter who had been raped said, "How can we be sure she gets treated fairly? Look what's happened to that girl in Glen Ridge." And as another woman, someone I met in a local library said to me, "I thought if you were raped, they couldn't treat you like that anymore. I thought there was a law against it."

We all thought that there was a law against it, but the Glen Ridge trial has shown the women of this State that the current Rape Shield Law is intrinsically flawed and does not accomplish the purpose for which it was enacted.

I think at this point it's appropriate to remember why we have Rape Shield Laws. Rape Shield Laws were first enacted -- the first law in this country was enacted in 1974 and, throughout the 1970s, they were enacted in all the jurisdictions and on the Federal level. The reason they were enacted was that there was an effort being made to remove hundreds of years of bias against women, which had been incorporated through the common law into our rape laws.

There are two basic legal or two basic theories that had infected the English common law going back as far as the 1600s. The first was that a woman who engaged in sex outside of marriage possessed the character flaw of unchastity. What that meant was, put simply: Consent to sex with one meant consent to sex with all. So that, if you were a woman and you had a sexual relationship and you weren't married, that meant automatically that you're going to have sex with anybody who asked you.

The second belief was that unchaste women were incapable of telling the truth. As one court put it, "promiscuity imports dishonesty." Because of these

erroneous and illogical beliefs, courts allowed proof of a victim's unchaste character to be used to defend against rape charges. Of course, these unchaste character rules were deemed inapplicable to men, and, in general, courts, even at that time proscribed the use of character evidence to prove specific conduct -- except as against women in rape trials. Rape Shield Laws were enacted to remove these false beliefs about "unchastity" and their effects on the law. We understand a woman's ability to tell the truth does not hinge on her virginity and that a sexually active woman does not automatically consent to sex with all men.

The Glen Ridge trial showed us, however, that the Rape Shield statute falls short in equalizing the law because it still can be construed to allow the "consent to one is consent to all" defense.

As the statement to A-677 recognizes, "Currently, evidence of the victim's previous sexual conduct is admissible, if it is material to negating the element of force or coercion." Thus, under current law, a defendant may bring in evidence of a victim's past sexual conduct with another person in an attempt to show that the victim consented to the defendant's own sexual conduct.

The new Rape Shield amendment proposed by A-677 takes steps to remove this long recognized defect from the law as it applies to defendants with no prior sexual relationship with the victim. It also takes steps to ensure that where a prior sexual relationship existed between defendant and victim evidence of that relationship would have to be highly material and substantially outweigh its prejudicial value before a judge could admit it. In so doing, A-677 seeks to ensure that rape trials are tried on the facts, instead of on rape myths and centries-old falsities about the chastity of

women.

Certainly, the women of New Jersey deserve to have their rapes evaluated on a fair and factual basis. They and all the citizens of this State should expect nothing less than fairness from their courts. I commend the Assembly for its action on A-677 and urge the Senate and Senator Gormley to move quickly to approve the bill and to restore women's confidence in our courts.

I thank you very much for this opportunity. Thank you.

ASSEMBLYWOMAN HECK:

Thank you very much.

We have Bob Laurino and Elizabeth Miller-Hall from the prosecutor's Office of Passaic County.

ROBERT D. LAURINO, ESQ.:

Good afternoon. Actually it's Essex County.

ASSEMBLYWOMAN HECK: Is it?

MR. LAURINO:

Yes. Both Elizabeth and I were the trial attorneys on the Glen Ridge case, together with an additional colleague of ours.

ASSEMBLYWOMAN HECK: Very good.

MR. LAURINO:

The legislation that has been passed by the General Assembly and is now before the Senate, I think, is a marvelous testament to the work of Assemblywoman, now, Commissioner Derman.

It was the Glen Ridge trial that gave impetus to this particular proposed revisions. As we learn through the course of Ridge and the trial of Glen Ridge, and this may sound unusual at first, but the Rape Shield Law did work to the extent that there was a body of information that was kept out, that was kept confidential and private. But in saying that, I think what it does, it points up the enormous inadequacies in law because there was so much more that we could not preven from coming in. Most people think that everything came in, because it did appear that way, that just about everything regarding this woman's sexual history did come in.

I think the problem there was-- That there are enormous inadequacies in the law -- really wide enough to drive a truck through -- that many of us who have been practitioners over the years in this particular field realized, but I don't think the general public quite realized. I think most of us who are either practitioners or advocates in this area knew what the law meant, but, unfortunately, others didn't. Probabily the most important people would be the judges that didn't quite grasp exactly what the main thrust of this particular statute was and the purpose for it.

What we see this law-- The new law that has been proposed is just, really, a *fine-tuning* to, hopefully, remedy and modify those problems that had existed up to this point in time.

The law is old. This was a law that was enacted-- The rape law itself came in, in the late '70s, with the new criminal code and these Rape Shield Laws in the early '80s.

At that time, this really was a statute that was state of the art and, I think, was looked upon by many other states enviously, as far as the rights that it gave to victims. But laws failed to keep pace with changes in the law.

One of the changes that we have suggested that is embodied within the first section, paragraph (a), is that the has been changing. There is now a law regarding lewdness which makes this law no longer a disorderly person's offense, but now, an indictable offense, where a person--commits an act of lewdness in front of a child under the age of 13, or somebody with a mental disease or defect. It's a very important change in the law, because, quite often, we are faced with cases in which someone could be possibly exposing themself in the front of a school with children. The most you could do, at that point in time, was to bring forth a disorderly person's offense. So you had, a revolving door where people were really not being punished for the grave nature of the offense that was actually taking place.

So, with the new Rape Shield Law, we hope, now, to also include among the particular laws that the Rape Shield would take effect is this law of -- or this crime of lewdness, as well, should a defense ever try to bring out a woman's prior sexual history or child's prior history, in the case where there is an actual charge of lewdness.

Within that paragraph (a), I think it's very important that the Committee has introduced such language that not only must the evidence be relevant, but it must be highly material. I think by doing so, what we're trying to say -- what the

Legislature is trying to say here, in very clear terms, is that material that is to come in, if it is to be admissible, would be material that essentially is an exception to the rule. Okay. That basically this type of information should not come in under any circumstances. So, therefore, if it does come in, we are, in fact, saying that this is an exception to rule under very, very narrow and limited circumstances.

As we move down to the paragraphs (c) and (d) these are possibly the most crucial ones -- I think this is where most of the misunderstanding took place within the law, because now what the law is doing is clearly distinguishing any prior sexual activity of the victim with the defendant as opposed to others.

Quite often, I would see judges essentially mixing up the two, and we're permitting the introduction of any testimony of any sexual activity of the victim, with any individual, regardless of whether it was with the defendant or whether it was with another person.

I think the law recognizes, as we have here, that there is a purpose for introducing sexual activity of the victim with someone else under the very narrow areas with respect to semen, pregnancy, or disease. I think that has always been true, not only in this law, but in Federal laws, as well. But then, we're drawing the very clear distinction, indeed, that basically, what we're trying to do is to say that sexual activity of the victim with the defendant is going to be introduced under a very, very, limited. circumstance.

What this also does is to try to have this particular law keep pace with recent Supreme Court decisions. The Supreme Court decision in *State In The Interest of M.T.S.* gave a new definition to this concept of force and coercion,

and New Jersey is probably in the forefront with probably one of the best definitions of force that I think anyone who is an advocate of victim's rights could ask for.

Within that paragraph (c) was probably the biggest problem that we had faced in Glen Ridge, which we hope to modify. When we talk about the testimony being introduced by either a lay or an expert witness, part of the failing in Glen Ridge was that because this woman was deemed to be mentally defective, we had to introduce testimony of her particular mental condition. And we had experts, therefore, having to actually interview her and to give an opinion.

The way the law operates is that if an expert is to take the stand and, if he elicits certain information that he bases his expert opinion upon, it is then open to the defense to attack the expert on his conclusions by going to that information. So, of course, if there is a case where a woman is deemed to be mentally defective, a doctor would ask such questions as to what her prior sexual history may be, to see if she really understands the nature of the sexual act itself, which is something that must be proved.

What the defense did under the guise of trying to attack the expert's opinion was to bring out everything that the young woman had told him. So, therefore, I think by including the language here that this law not only pertains to lay testimony but also to expert testimony, again, with the same guidelines that it must be something which is relevant and highly material, hopefully, the excesses that we saw in the testimony of Glen Ridge will not be repeated.

One last thing in Subsection (e), when we talk about the different types of sexual conduct, this law will now provide, as we had suggested -- that we will include such

things as the gynecological records of the victim. I think one of the real atrocities in Glen Ridge was that this young woman's gynecological records where being introduced by the defense. No one ever thought that such a thing could probably done, and I don't think there was anything that probably bristled more people than the concept of having such private and personal records come in wholesale. They did come in, they came in a very limited basis, as we were able to work out an agreement with the defense and with the consultation with the famlies, so we're able to limit the impact of that. But I think it was unknown to a lot of people that such material would be open for such public disclosure in a courtroom.

Hopefully, this modification of law will go a long way to p revent that type of excess, as well.

Thank you.

ELIZABETH MILLER-HALL, ESQ.:

I just wanted to point out that, as Bob said, in paragraph (c) those are probably the most important changes, and'by our moving that exception regarding negating the element of force or coercion, that really takes out the biggest loophole that was there previously. That sort of brought in everything in Glen Ridge. It's very nice having that removed.

ASSEMBLYWOMAN HECK: Good.

ASSEMBLYWOMAN GREGORY-SCOCCHI:

I think both of you did a good job, even though it didn't turn out the way I would have liked to have seen it.

Turning out-- I think both of you did a good job, and thank you for coming this afternoon.

ASSEMBLYWOMAN HECK:

I think this is important. It was a terrible situation for that young woman to go through and her family. But it brought forward all of the problems that we do have in the law and, perhaps, that will expedite the passing of this law so, here after, young women and other women of every age won't be put through a tragedy, such as happened in that case.

MR. LAURINO:

Yes, if nothing else, it was a marvelous educational experience. I think rape -- the rights of the mentally disabled took a real front burner.

ASSEMBLYWOMAN HECK: Oh, it really did.

MR. LAURINO:

I think there has been a lot of discussion. I've had the opportunity to discuss this with a lot of groups for the disabled. I think it's a very healthy thing that people are talking about it, discussing it, and, as you said, that it did give impetus to people understanding that there nust be changes in order to prevent those types of abuses.

ASSEMBLYWOMAN HECK:

Absolutely, it was kind of a sad situation to have one of the people in that community be so exposed and so tortured, from my point of view.

MR. LAURINO:

Yes, I agree. Thank you all.

ASSEMBLYWOMAN GREGORY-SCOCCHI: Thank you.

ASSEMBLYWOMAN HECK: Thank you very much. Ruth Anne Koenick.

Hello.

RUTH ANNE KOENICK:

It's so nice to be here and among people who think the same way that we all think on this. I get to see old friends, so that's really delightful. Let me put my glasses on and let's get started.

My name is Ruth Anne Koenick, and I'm here representing several different constituent -- several different organizations, but with one constituency, individuals who have victims of sexual violence.

For the past 23 years, I have spent my career working on the complex issues that support and often reward sexual violence in our culture. As founder and current President of the New Jersey Coalition Against Sexual Assault, as the past Director of the Rape Care Program in Middlesex County at Roosevelt Hospital, and currently as the Director of Sexual Assault Services at Rutgers University, I have on a daily basis seen the impact that this type of violence has on individuals and groups within our society. I want to take just a few moments to convey to you, very briefly, some of my thoughts about this. I'm going to leave the intricacies of the language to those who know that better than I and talk to you about

how I feel about this particular piece of legislation. I want to thank you for inviting me, because I think it's important to get the perspective of one who has been in the trenches, since we were all a whole lot younger.

Fifteen years ago, the New Jersey Legislature in its wisdom enacted a very progressive sexual assault statute. Now, when I first started working in this field, the way that one state that I looked at how they defined sexual assault was to carnally know and ravish a woman, not your wife, against her will. It says a lot about how we thought about the issue of violence in those days. It wasn't the statute from New Jersey.

New Jersey has a very progressive law, one I think that is really a leader for this country. Among other things, it's inclusive of all types of sexual violence and really saw no barriers. It acknowledges that sexual violence occurs between strangers and acquaintances, young and old and that a marital contract does not imply consent. But that this also-- What's really important is that this type of violence is not gender specific, that men and women, boys and girls are both victims and actors. And we often forget that. We don't think about the male victims, because traditionally this has been the type of issue that has been looked at by women. I think, it's really important to include this, because rape by any name -- doesn't matter what you call it, doesn't matter who the victim is, the impact is traumatic.

When I first started in this field, it was a given that the legal and medical interventions for a victim or survivor were really a continuation of the trauma that he or she had experienced during the sexual violence itself. In fact, the very word trauma can be conceptualized as something that goes on for a moment but becomes a memory by the traces it

leaves behind. What I deal with every day are the traces that this type of violence leaves on the men and women at Rutgers University.

Over the years, the legal entities, the medical personnel, and the laws have sought to change that to a system that is less invasive, less judgmental and more supportive, humane and really an integral part of an individual's recovery. But in the last year, we have been reminded that very little has changed, except the continued interest from the Legislature and the public outcry.

Based partially on the Glen Ridge case but also on the issues of whether a victim's name should be public information, based in the treatment that the victim in Palm Beach received and other disgraceful displays of legal abuse, we've begun to explore the way we treat those who are in compliance with our laws.

Last May 29, there was an article in *The New York Times*, reporting on the Glen Ridge case, and I bring this up because I think it's important. It reported Judge Cohen's reasoning for not revoking the bail on one of the defendants. And if you could believe -- I generally believe what I read in *The New York Times*-- but if you can believe what the newspapers said, it reported that he said that the prosecution had failed to produce a witness for live testimony, in order to give the lawyers a chance to challenge her reliability and credibility. And I ask you, almost a year after I read that in paper, would any person, including Judge Cohen or any of your or me, having witnessed shameful legal manipulations in that courtroom in Newark come forward and publicly testify about an assault? Would you or any of us not only for ourselves, but ask our sons or daughters to do that? I certainly wouldn't.

Working on a college campus, I can tell you that it is the norm for victims of acquaintance rape, in particular, to refuse to file charges for many reasons, but primarily because of an intense need to regain control over their lives through maintaining some shred of privacy.

Now, although Glen Ridge has obtained a tremendous amount of notability, let me reassure you that what happened in courtroom happens everyday in courtrooms throughout the State. That an invasion of one's privacy or just the fear of that invasion keeps, on a daily basis, people in our State from getting assistance from the very laws that we support.

Day after day, hour after hour, I talk and work with women and some men who choose not to legally pursue their victimization for fear both of direct and intimate accounts of their current and past history, not only sexual but all components that help us to erroneously judge a person. They believe that this will be open for public scrutiny and voyeurism.

We live in a culture that practically beginning in utero teaches us that men and women are suppose to learn, live, love, dress, dance, yes, be sexual in a very rigid, very controlling well-defined manner. One only has to look at Lakewood, California, and, for that matter, in our own neighborhoods to see how boys and girls, men and women are percieved. The language we use to describe them sexually is very different. The language we use to support their sexuality is very different.

I think it's time for us to take a stand to say that a person has the right to a personal history that is private, that irrelevant conduct and their chosen way of living belongs no place near the courtroom.

Now, in thinking about what I wanted to say to you today, I began to look at the close to 2000 people I think I've worked with. I started to add them up over the years, and it's probably close to 2000, mostly women, a lot of children, and a few men. I thought about the many people who have had their lives changed because of another person's violent actions. But mostly, I thought about the numerous victims particularly adolescents, particularly the people that I work with, primarily, for they are prime targets for this type of violence. Most of what we know about sexual violence says that the vulnerable time period for a person, for a women being assaulted is the summer after high school and her first year of college.

I thought about the many people that I've worked with in just the four short years I've been at Rutgers, and the cries I've heard for a return of their self-confidence, respect, and dignity, of their fear of once again experiencing the ultimate exposure and of their profound sense of pain.

I thought of those who never tell anyone for the fear of losing their last shred of personal control. I understand that we can't return to them what has been taken away. But I ask that you support A-677 in an attempt to tighten the court discretion, focus the proceedings where they belong and away from irrelevant conduct.

But mostly, I ask that you support A-677, as a means to providing the survivor with a pure sense of human dignity. I also want to add, and I forgot when I was preparing this, I wanted to add that we feel so strongly about the issue of the Rape Shield Law that in our current and our new, soon to be incorporated student disciplinary code that Rutgers has just adapted for beginning in 1995, we have a section in the procedures that says the current Rape Shield Law will be used

as a way to look at the evidence that's admissible in our own hearings.

I hope that when it's included in -- when it begins in 1995 that it includes A-677, rather than the current law. I think it will go a long way to make a statement to tell all of us about the way we feel about this issue.

Thank you.

ASSEMBLYWOMAN HECK: Thank you very much.

ASSEMBLYWOMAN GREGORY-SCOCCHI: Thank you, Ruth.

MYRA TERRY:

I'm Myra Terry.
Wrong one-
Hello.

Well, I said this off the record, and I want to say it on the record, now, also. It's wonderful being here surrounded by women who ask the questions, who understand the questions, who understand the answers, and it is a very different way to testify when we're being presented this way, and it's not curiosity, it's an inclusion, inclusive of all of us. It's almost tearful to be in-this situation. It's something that we dreamed about 20 years or 30 years ago. We certainly have to go much further than this, but this is great.

My name is Myra Terry, and I am President of the National Organization for Women of New Jersey, which represents 12,000 women in New Jersey. Most of the testimony I was planning on giving today was given very

eloquently by Chris McGoey, who spent every single day at the Glen Ridge trial. So I'm going to avoid some of that and go on. I'll just talk a little bit about that just to reiterate.

Assembly Bill No. 677 would limit the admissibility of evidence regarding the sexual conduct of the victim, admitting only evidence that is highly material in proving innocence. In words, the relevance of a victim's sexual history would have to substantially outweigh the harm that such an invasion of privacy could cause.

Any information about the victim's previous sexual contact, with the defendant or with others, is irrelevant unless it absolutely negates the elements of force or coercion. Whether a women is a nun or a prostitute, "no" means "no". Whatever might have happened in the past, doesn't matter. If she says no, it's rape. Ruth Anne also dealt with that very eloquently in dealing with the issues of rape.

Assembly Bill No. 677 would spare us from hearing ridiculous information about a person's anatomy and protect the victim from such humiliating, demeaning, and irrelevant scrutiny. After seeing what happened in our Glen Ridge case, victims are genuinely scared to report rapes at all. We do women a grave injustice by being so cavalier as to assume that they should report all rapes. Every case is a case by case basis, and we have got to be less cavalier about it. Without the assurance that these women will not be victimized and humiliated all over again, women will continue to be afraid to report, and we really won't know how many rapes are really happening out there.

This amendment to the Rape Shield statute arose out of a combined effort of the Women's Section of the New Jersey Bar, then Assemblywoman, as you know, Harriet

Derman; Ruth Anne Koenick, who you heard today, from the New Jersey Coalition against Sexual Assault; Riki Jacobs and Kathy Waldor, of the Commission on Sex Discrimination on the Statutes, and, of course, NOW-New Jersey. We played an integral role in that. It is our intent to prevent what went wrong in Glen Ridge, as it is everyone else's here and the blaming of the victim or all victims and to get rid of this "boys would be boys" attitude being a red light -- a green light -- put up a red light -- no yellow lights.

Does anybody want copies of this?

ASSEMBLYWOMAN GREGORY- SCOCCHI:

And thank you for your testimony.

ASSEMBLYWOMAN HECK:

I think it's important, Myra, that I point out that not just here today-- I'm glad you're supporting the bill, and we haven't heard any suggestions about improving the bill or changing it. So I'm glad about that. That means we can expedite and start moving it towards the standing Committee on force. Really, we have to get a good group out. We would like to make certain that the people here today are notified of the hearing, when it is scheduled, so that we have large numbers.

It appears that when there is not overwhelming support, our women's bills, such as these, do not appear in the Judiciary committees. That they are considered-- Because there are so many crimes out there, and there are -- I'm not saying they're aren't -- there are so many crimes out there that we have been told to wait our turn, because there are so many important matters going on.

However, we have now reached a point where numbers of men and women are attending our Advisory Council meetings. We pass this word along just like a chain letter, right to the standing Committee. Tell them you would like to see this bill posted and action taken, so it goes to the Assembly floor for a full vote. Unless we move in a concerted effort of support, we are going to see nothing happen, and, as nothing happens, more victims will be brutalized out there.

MS. TERRY:

We are now seeing this as something that has to be done in the Senate. Correct? It has gone through assembly--

ASSEMBLYWOMAN-HECK:

Well, actually it has not this year.

MS. TERRY: Okay, it has to be reintroduced.

ASSEMBLYWOMAN HECK:

The new legislative session must move through the whole process again. Last session it went through the Assembly, but was left to die in the Senate, so what we were--

MS. GLYNN: It has in the Senate Judiciary Committee.

ASSEMBLYWOMAN HECK:

Oh, they're putting it up this year, it's in the judicial--

MS. GLYNN:

It's already moved through the Assembly and it's in the Senate Chambers.

ASSEMBLYWOMAN HECK: Oh, it did go through.

MS. HORL:

At the beginning of the session, Assemblywoman.

ASSEMBLYWOMAN HECK: All right, then it's over there.

MS. HORL: Yes. Senator or -- we have to petition.

ASSEMBLYWOMAN HECK: So the point being that we have to get it through. How did this get through this Committee so quickly, I'm amazed.

I think the letters have actually-- No, I've sent letters. (laughter)

UNIDENTIFIED SPEAKER:

Maybe he wants to be nice to you.

ASSEMBLYWOMAN HECK:

I will say this, that there are changes happening because of the number of people coming out. And the number of men and women pushing these things. It's a very important part of the process, and I'm very pleased that he likes you so much. (laughter) But, again one of the things--

MS. HORL:

He should be politically correct, though, when he

does that-- People are getting into trouble for the way that they like you so much these days, publicly.

ASSEMBLYWOMAN HECK:

I'm glad Senator Gormley is doing that. I'm sure it will go before the full Senate and because, if he's giving you his support, he's pretty reliable.

MS. HORL:

And if not, it might be time for a--

ASSEMBLYWOMAN HECK: I really think so.

MS. HORL:

--joint effort between the women in the Legislature and our joint organizations to do some kind of action.

ASSEMBLYWOMAN HECK:

I think this is very important, because we can get lost again. It happened the last time, they can repeat those things.

ASSEMBLYWOMAN GREGORY-SCOCCHI:

We need to have those letter writing campaigns also to Senator Gormley, Myra. I'm hoping that all of the organizations that I see, a lot of my friends here in Middlesex County, here, I'm hoping that all of the organizations will write those letters to the Senator, asking for his support of this bill.

ASSEMBLYWOMAN HECK: Absolutely.

ASSEMBLYWOMAN GREGORY-SCOCCHI:

It'sextremely important.

ASSEMBLYWOMAN HECK: To post it.

MS. HORL: We're asking to post.

ASSEMBLYWOMAN GREGORY-SCOCCHI:

We're asking to--Right.

ASSEMBLYWOMAN HECK:

Absolutely.

ASSEMBLYWOMAN GREGORY-SCOCCHI:

And support and all the other Senators, also, we should be writing letters to.

MS..HORL: Okay, we'll put that out.

ASSEMBLYWOMAN GREGORY-SCOCCHI:

Thank you.

ASSEMBLYWOMAN HECK:

Thank you very much.

We're going to see how quickly our bills go through. Kathy Waldor.

UNIDENTIFIED MEMBER OF AUDIENCE :

She's not here.

ASSEMBLYWOMAN HECK:

Joan, is it Mattia? Joan Mattia, Women Helping Women, from Metuchen.

JOAN MATTIA:

Hello there. I'm very pleased to be here, and I appreciate the opportunity. I'd like to share that is a maiden happening for me with regard to speaking in of your Council or/and your Advisory Committee, or for that matter any other. Write letters, I've done; sitting in front of you people, I have not done.

As you mentioned, I'm Joan Mattia. I'm from Women Helping Women, in Metuchen, New Jersey. We're a nonprofit, social service agency, serving the women of Central New Jersey. We have been doing this for some 20 years, and we find that to be a pretty laudable feat considering that any and all women's centers have never been on anybody's high priority list of funding during 1975 to the current time.

While Women Helping women is a nonprofit organization serving women, we have on many occasions remained purposely out of any political arena with regard to speaking up as an organization directly -- vocally. Most of us, many of us have personal views, personal opinions, and, yes, we will quietly post the notices in our office and on our bulletin boards, but we do not go out and speak up, if one is trying to find funders and supporters. Through the years, we have learned that, first, we needed to do that. Second of all, we hoped that we could make an impact by how we produced

well women out there.

So I am here today to briefly let you know that times are changing. On behalf of Women Helping Women, all of its members, all of its clients -- we certainly do support the New Jersey Rape Shield Law with the inclusion of the amendment that is being discussed here today. We will definitely, in our more recent newsletter that is going to be coming out, encourage people to write to their legislators to see that this gets passed.

Thank you very much.

ASSEMBLYWOMAN HECK: Thank you.

ASSEMBLYWOMAN GREGORY-SCOCCHI:
Thank you, Joan.

I would just like to mention, how fabulous a job Women Helping Women-- Joan Mattia and I have known each other for quite a number. of years now. Time flies, doesn't it, Joan? They truly do help women in Central New Jersey. It's a nonprofit organization that I personally have recommended people to, to go get help. These are women that have been raped in the past or have faced domestic violence situations, they have done wonderful things. They have support groups, have individual counselling; it is truly a model of how important it is to have a community center right in a local town. How many women -- I think, Joan, you might mention -- come from all over Central New Jersey into little Metuchen to access and use the facilities that Women Helping Women have set up.

MS. MATTIA:

Well, I must admit that it sort of suprises us every now and then. But when we did our last count, we realized that we service probably 3500 women a year. You have to understand that we are a staff of three and a half people. We rely heavily on the work and the commitment of volunteers and counselors, who come to us on a consulting basis, not staff. So we're a small group, but we're pretty mighty and pretty persevering and I think we do a good job.

ASSEMBLYWOMAN GREGORY-SCOCCHI:

Thank you, Joan.

ASSEMBLYWOMAN HECK:

Melanie Griffin, the Executive Director of -- no it's-- What does that say? Oh, Commission -- I'm saying Common Sex Discrimination. What is that? (laughter)

MELANIE GRIFFIN:

I'm sorry, I abbreviated. It's so long.

ASSEMBLYWOMAN HECK:

I was a little stunned there. Common Sex--

Okay, Thank you.

MS. GRIFFIN: Good afternoon. Yes, I am Melanie Griffin. I'm the Executive Director of the New Jersey Legislative Commission on Sex Discrimination in the Statutes, which is a body that was formed by the Legislature in 1978 to look at the statutes that discriminate on the basis of sex and recommend to the Legislature a comprehensive revision of those statutes..

Certainly, the work of the Advisory Council on Women, in the Assembly, has helped our cause because we get a lot of publicity for our issues out of this. Obviously, most of the discrimination -- the sex discrimination that goes on in this society hurts women not men, although, we have found some places where it has hurt men, and we've adjusted those statutes accordingly.

So I want to thank you for holding this hearing and for your good work in the last two years, a year and a half - three years now. Right? Almost.

ASSEMBLYWOMAN HECK:

We want to thank you for your imput. You've been very helpful to us.

MS. GRIFFIN:

Certainly.Well, we have to work together on these things.

ASSEMBLYWOMAN HECK: Yes, absolutely.

MS. GRIFFIN:

But I wanted to address Assembly Bill No. 677 at this point. I just want to say that this is something that we've been involved with. The Commission is currently drafting a report which should be done this summer about violence against women. This is one of the two major concerns that we have with rape prosecutions.

Although, the Glen Ridge trial made it very clear that

there were loopholes in the Rape Shield Law, the loopholes had been apparent to rape victims and their advocates for many, many years. As horrible as it was to have to go through watching the Glen Ridge trial and for the participants to have to go through it, it certainly did focus the world's attention on New Jersey's inadequacy in this regard.

The other area that I will just briefly mention is the chain of evidence, which prosecutors always complain about. The hospitals don't get the evidence right away. They don't keep it safe so that the prosecutors can use it. These two problems have contributed greatly to the statistic that was brought out at the Senate -- the U.S. Senate Judiciary Committee hearings on the Violence Against Women Act, at which point, one of the witnesses said, that probably two percent of rapes are ever even prosecuted in this country. One percent, half of those, result in a conviction. So we're talking about a crime that is virtually ignored by our system mostly, again, because of the holes in the Rape Shield Law all over the country.

I have to emphasize that New Jersey does not have certainly the worst law in the country, but it certainly doesn't have the best law either. We're going to be watching what happens after this law goes through because we know that in the states where they have cleaned up their act, as far as Rape Shield, defense attorneys have gotten very creative about things like suing rape victims for slander to try to intimidate them.

Defense attorneys and rapists are abusers in the sense that they are people who are very concerned about discrediting the victim, because it's usually all they have as a defense. If you get to the point where you're in one of that two percent that gets prosecuted, you're grasping at straws to

try to get your client off.

I think, again, that it is important to separate the behavior of the victim with the defendant, from the behavior of victim with anyone else. That's one of the strengths in this amendment. It may be relevant to what the defendant believed about consent, some previous behavior with the defendant, but it's absolutely irrelevant that the victim ever consent to any sexual activity with anyone else. I think this bill, as drafted, makes that important distinction.

Again, we're talking about the balance of a constitutional right -- a set of constitutional rights the defendants enjoy against society's perceptions about rape victims. We do have to do a balancing act.

I want to join all of my sisters at this table in saying that -- and at that table -- in saying, I think it's vert important to push Senator Gormley to hear this bill, because as you've noticed, several times this did get through the aAsembly last time. It's through the Assembly now. The Assembly is not the problem. We need to have the women's organizations and the organizations of men and women who support the rights of crime victims to come out and understand how important it is that this crime not be treated differently from other crimes because the victims are primarily women.

Thank you very much.

ASSEMBLYWOMAN HECK:

Thank you, Melanie. I appreciate that. Linda Bowker, the Director of the Division on Women, Department of Community Affairs.

LINDA BOWKER: Thank you.

I want to reiterate what I've heard several times. It is so nice to be talking to people that I know already get it. I wonder if there isn't a connection to the fact that when you have a number of women in the Assembly and this bill goes through the Assembly -- we have only one woman in the Senate, it seems to have a rougher time getting through there. Maybe we just need to put more women in the Senate.

As I'said, I do appreciate this opportunity and want to take advantage a little and speak on behalf of my Commissioner, Harriet Derman, a former colleague of yours in the Assembly. She is very sorry that she cannot make it here today, but did want me to read her remarks.

"As an Assemblywoman from-the 18th district in the 205th Legislature, I was fortunate to have several important pieces of legislation approved and signed into law. I believe, however, that no bill with which I have been involved is more important than the one that is before you today, the bill to amend the Rape Shield Law.

"This legislation is the result of contributions from many different groups, including women's organizations such as NOW, Rape Counsellors, and the Women's Rights Section of the Jersey Bar Association. The bill strives to protect the defendants VI amendment rights to confront and cross-examine witnesses while preserving the victim's right to a courtroom examination that focuses on the charges rather than the victim's sexual history.

"The bottom line is that when a woman says 'no,' it means 'no' and must be respected. What she said or did two years ago simply is not relevant.

"I am proud to have been the sponsor of this bill in

the last session. On January 27th of this year, when A-677 passed the Assembly by a vote of 75 to 0 of my colleagues, I was elated. I am confident that the bill will reach its fruition in the capable hands of Assemblywoman Joanna Gregory-Scocchi. Joanna will begin where I left off in making sure that women's rights are protected and that victims of sexual assault will not be twice victimized in New Jersey's courtrooms.

"We must say to the women of New Jersey, report the crime of rape, and we will not vilify or crucify you in the courtroom. Report rape and you will be handled with sensitivity. Your rights will be no less than those of your attacker. Your body has been violated; your privacy will not violated.

"By assisting Assemblywoman Joanna Gregory-Scocchi in her efforts to have Assembly Bill No. 677 advanced into the Senate, you will be assisting all your daughters, sisters, mothers, and wives in attaining the rights due to them in New Jersey's courts of law.

"Thank you."

If I can, I would like to then speak for the Division on Women, which is in the Department of Community Affairs.

In the United States, it is estimated that a woman is raped every 1.3 minutes, and that one out of every three women will be the victim of sexual assault during her lifetime. It is imperative that women know that they will not be put on trial instead of the rapist. The Glen Ridge case had a chilling effect on women's confidence that their privacy would be protected in a rape trial.

No woman should have to have her gynecological records used to impugn her reputation. No woman should have to have the size of her breasts discussed as an excuse for rape. No woman should have her previous sexual history used against her in order to help free a rapist.

We are long past the time, when a woman was the property of a man, with no control of her own body and no recourse when her rights were violated. But a trend is devoloping for a defendant to claim consent. Without the protection extended by A-677, a woman is very vulnerable to being raped again in court as her character is assaulted and privacy violated.

The Division on Women supports A-677 in its entirety.

I thank you for what you're doing here. It's really important.

ASSEMBLYWOMAN HECK: We thank you very much.

ASSEMBLYWOMAN GREGORY-SCOCCHI: Thank you, Linda.

ASSEMBLYWOMAN WEINBERG: Linda, if I may. First of all my apologies for arriving so late, but I had trouble finding my way from Newark to the Middlesex County College Campus. I just want to take a moment.

Yesterday was "Take our Daughters to Work Day" and there was a particular celebration in Trenton of this. Joanna brought her lovely young daughter with her. But I just want to complement you, Linda, the Division on Women, and the Department of Community Affairs for the wonderful

job you did putting that day together. It was wonderful.

MS. BOWKER:

Thank you and we really appreciate all support that we got from you.

ASSEMBLYWOMAN WEINBERG:

Just a slight--a side comment from--

MS. BOWKER: Thank you.

ASSEMBLYWOMAN HECK:

By the way, this is Assemblywoman Loretta Weinberg, from Bergen County.

ASSEMBLYWOMAN WEINBERG: Thank you.

ASSEMBLYWOMAN HECK: I though you got lost in the parking lot. (laughter)

ASSEMBLYWOMAN WEINBERG:

I did that, too. I got lost in !lewark and in the parking lot. (laughter)

ASSEMBLYWOMAN HECK:

Lauren Ziegler, from New Jersey NARAL. (no response)

ASSEMBLYWOMAN WEINBERG:

Did somebody tell you about Shirley Turner?

ASSEMBLYWOMAN HECK: What happened?

ASSEMBLYWOMAN WEINBERG:

Let me just announce it properly.

ASSEMBLYWOMAN HECK: Oh, yes, please.
ASSEMBLYWOMAN WEINBERG: On behalf of my colleague, Assemblywoman Shirley Turner, she had to accompany her mother into the University of Pennsylvania Hospital today for some further tests and perhaps some surgery. So that is why she is not wiht us.

ASSEMBLYWOMAN HECK: Thank you.

ASSEMBLYWOMAN GREGORY-SCOCCHI:

Lauren-- I don't Lauren see here.

ASSEMBLYWOMAN HECK: She's here.

ASSEMBLYWOMAN GREGORY-SCOCCHI: Is she?

ASSEMBLYWOMAN HECK: What Evelyn Ortner?

ASSEMBLYWOMAN GREGORY-SCOCCHI: Yes.

ASSEMBLYWOMAN HECK: She's here.

ASSEMBLYWOMAN GREGORY-SCOCCHI: No, Lauren.

ASSEMBLYWOMAN GREGORY-SCOCCHI: Who are you talking about.

ASSEMBLYWOMAN GREGORY-SCOCCHI: No, Lauren.

ASSEMBLYWOMAN HECK:. She's not in.

Evelyn Ortner would like to address us. Evelyn is the Executive Director of The Unity Group, a nonprofit, advocacy group for battered women and their children.

EVELYN ORTNER: Thank you so much, Rose, for injecting me into your program. I really do appreciate your indulgence.

I will take just a moment to say how much I admire everyone in this room and, particularly, Rose and her staff for the tremendous job that she and all of you are doing. On behalf of The Unity Group, I want to express my full support for all of these bills, and we will, in any way possible, support you on an ongoing basis. Please just inform me and the work will be done.

Thank you very, very much and good luck in everything.

ASSEMBLYWOMAN HECK:

Thank you. We all need the luck. All of us working in our individual areas.

Irene Von Seydewitz from -- she's AWARE.

MS. HORL:

She just had to leave, there was an emergency she had to--

ASSEMBLYWOMAN HECK.:.. Oh, all right.

Is there anyone else who would like to address us? (no response)

No.

I think, though, that you have had full support of your bill. Now the controversial one's come up. We will just give an overview of those.

I think, Loretta, you and I have our work cut out for us. I know that we have no one here to testify today. However, Honorable Loretta Weinberg and Honorable Rose Marie Heck, the Attorney General has something to say to us.

ASSEMBLYWOMAN WEINBERG:

I just might listen to her.

ASSEMBLYWOMAN HECK: Did Assemblywomen--

ASSEMBLYWOMAN WEINBERG: Is it in the folder?

ASSEMBLYWOMAN HECK: No, it was just handed to us.

Why don't you read the letter out loud for me, Norma. I have a terrible copy.

MS. SVEDOSH (Committee Aide) :

This is from the Office Attorney General:

"Dear Assemblywomen Weinberg and Heck: We regret that it appears that no one from our office will be available--

ASSEMBLYWOMAN HECK:

Excuse me. Any time you get a letter that says, "we regret" it then goes into-- Yes, go ahead.

MS. SVEDOSH:

--available to come to the meeting of the Assembly Task Force and the Advisory Council on Women. The purpose of this letter is to advise you that we are reviewing A-1368 and looking at the implications of the changes in the law which this bill will affect in the Domestic Violence Act. We wish to apprise you of two concerns. which we have about some provisions in this bill, and we hope that you will consider these concerns when you are taking whatever action you deem appropriate during your review of this bill.

"Our first concern centers upon that portion of Section 1 of the bill, which would elimiate N.J.S.A. 2C:25-21d, subs section 5, which heretofore has provided law enforcement officers with civil immunity for their alleged failure to learn of, locate, and seize a weapon pursuant to the Domestic Violence Act, and for their alleged wrongful acts in returning a seized weapon to the owner. Of course, we encourage prudent vigilance by law enforcement officers in their determination whether to seize weapons, but the threat of a Civil suit may be too harsh and may be an unwise method to accomplish this goal.

"Our second concern centers upon Sections 2 and 3 of the bill, which would mandate at least a two-year period during the subject of a restraining order would be barred from receiving a handgun purchase permit or a firearms purchase identification card. It may be wiser to allow the judge to have some discretion in this matter.

"We hope that our comments are helpful. If you have any questions, please do not hesitate to contact us."

ASSEMBLYWOMAN HECK:

Allowing judges discretion really gets to me. (laughter) I understand that the Attorney General has to look at things from another perspective, but I have to saty that this, indeed, is an important area that we should be looking into. I don't think Loretta and I are immovable to reasonable requests.

However, we must consider them reasonable. I think the Attorney General might be more specific at a later date and then we can address it. But, Loretta, these were really your pieces.

ASSEMBLYWOMAN WEINBERG:

First of all, let me say that it is a great pleasure to be serving on this Advisory Council. I came from-- When I came here today, the reason that I got so lost was because I was coming from Newark, where I spoke in front of an employee group at PSE&G, on women and politics. On of the things I talked about was you, Rose -- one of the people I talked about was you -- because in a bipartisan way and really with Rose's cooperation and understanding, we together have tried to accomplish things on behalf of the women of our State.

Since Rose's party is the majority party in the State Legislature at this present time, I appreciate her ability to bring all of this together in behalf of all of us and she does deserve a tribute for that.

So you can all give her a round of applause, if you want. (applause)

ASSEMBLYWOMAN HECK:

Do you want to make a note, how we first started, Loretta.

ASSEMBLYWOMAN WEINBERG:

Yes, we first met a long, long time ago, when, of course, we were each working in a campaign for somebody else, some man -- each of us a different a man.

ASSEMBLYWOMAN WEINBERG:

That we have chosen to forget. None of us even remember who the candidate was.

ASSEMBLYWOMAN HECK: Different parties, right.

ASSEMBLYWOMAN WEINBERG:

There we were carrying in the absentee ballots to the Board of Elections and we met at the counter. And, you know, sort of mused about-- Yes.

ASSEMBLYWOMAN HECK:

And we commiserated, like, we're only ones who have to do this gofer work.

ASSEMBLYWOMAN WEINBERG: That's right.

ASSEMBLYWOMAN HECK:

Because we're dependable. Women are dependable.

ASSEMBLYWOMAN WEINBERG:

So, anyway that was -- we kind of struck up a relationship then, never knowing that it going to lead to, hopefully, some fruitful action here in the State Legislature.

But I wholeheartedly agree. I sort of smiled a little bit when I read that sentence. I mean, in this age of manditory minimum sentences, to decide that a judge can use his or her discretion in the case of a firearm in a domestic violence case, when we know that in Bergen County, a judge used his discretion to send a spouse home to murder his wife in a terrible case and chose not to allow that spouse to speak in court to say why that restraining order shouldn't be lifted--

So I think this is one case, until we get to a stage where we know all of those judges are properly trained and sensitized about this particular issue, that this is an area that I would not want to see left to the discretion of the judiciary. I feel very strongly about that.

The other portion, you know, I think we certainly should discuss the civil immunity. I don't want to put law enforcement officers in more jeopardy than they already are are in carring out their duties. So, you know, hopefully we can get together and--

ASSEMBLYWOMAN HECK:

Anything that's reasonable, I think, you know, each of us is of a mind to find improvements. Melanie, you have something to offer?

MS. GRIFFIN:

I did want to talk a little bit about these bills, but particularly, as to the civil immunity. The immunity that was put in there for police officers when these-- when this amendment to the 1991 law was drafted it was put in at the request of the NRA. And it's kind of a pro-gun owner immunity, to keep police balanced on the side of leaving guns in the hands of gun owners.

If that special immunity didn't exist, which your amendment would accomplish, then the police would just fall on their regular immunity, which is, they're immune from everything, as long as they act in good faith.

ASSEMBLYWOMAN HECK: Yes.

ASSEMBLYWOMAN WEINBERG: Right.

MS. GRIFFIN:

So this takes away the requirement of good faith where it comes to guns. So you could be not finding that gun, because it's your brother-in-law who is the abuser, and you would be actually immune. I don't want to see police officers immune in that circumstance.

So I applaud your effort to do that. I have spoken to people in the Division of Criminal Justice about this, and they are still considering their position on that. I don't think that it is written in stone at this point.

ASSEMBLYWOMAN WEINBERG:

Yes, well the fact, as you said, if I may-- Then the

police officer still has the regular immunity then? Okay.

MS. GRIFFIN:

Absolutely, and it's very broad. We know the police should not be put in jeopardy of being sued for carrying out this law. It conflicts with the regular immunity and the good-faith requirement.

As to the rest of these bills, I want to applaud the efforrt of your office for putting these in and for being so strong about putting them forth. They're going to be very hard bills to get through.

ASSEMBLYWOMAN HECK:

Well, let's look at some of the testimony. I don't think you were there that day, Melanie. We were in Sussex County at the community college up there, and a group of women from the Battered Women's Shelter had asked their director to come to testify, if they could come to testify, and they did.

One of the women was the mother of three little children, toddlers, you know, pre-school. She said that her husband had been abusing her for years, and she would have gone taking the abuse with no problem because she didn't want her faimily to know, didn't want her friends to know.

I wouldn't think that the girl was -- woman was more than 28 years old, very young, very sensitive, and very sweet. But she said her husband had threatened her, and had a firearm, and chose to wield it around in his threatening of her, and it fired, she thought, accidently. But the point I'm trying to make is that it passed by her and struck the wall near her childs crib.

That having occurred-- the child was, of course, not injured. That having occurred gave her the courage to leave this man, because she felt that even though she could take the battery and the threats, that accidently -- that's questionable too-- one of her children might be killed or harmed. So, to get them out of harms way, she came forward.

So, I mean, that's amazing. But there are many, many women out there just like that. Firearms are used to threaten and timately kill the victims. No doubt about that.

MS. GRIFFIN: That's right.

Yes, we've certainly had testimony from a number of battered women who have been terrorized by firearms that have never been shot to the point where they would not leave the house, because they were told that the firearm would be used. It's terrifying. They're horrible--

ASSEMBLYWOMAN HECK:

Yes, absolutely. And let's not forget that psychologically and emotionally these people are murder. They're gone. They're just -- they've lost their self-confidence, their dignity, their self-esteem, and they live in fear all the time. So they're not a whole human being any more.

ASSEMBLYWOMAN WEINBERG:

You know, if we look upon owning a gun as a privilege -- I believe, I'm quoting some of national figures when I say that -- just as a driver's license is a privilege, then those people who are prone to violence should not have that

privilege, because it is too dangerous for the recipient, as well as the perpetrator, in this particular case.

It just seems to me so clear, that why would you want somebody who is prone to that kind of physical violence, within his own family unit, to have access to a gun and more easily really inflict serious harm. I know people say, "Well, you've got knives in your kitchen drawers." Yes, we all do. We all take our lives in our hands when we cross the street. But we don't have to cross against the light and make it even more dangerous. We can take certain precautions and this would appear to me to be a very simple and straightforward one.

MS. GRIFFIN:

I did have two other suggestions about Assembly Bill No. 1367, if you'll indulge me.

One of the things that I did want to just say on the record was that we found, over the years, that 50 percent of women are subjected to domestic violence at some point in America -- during their marriages, during their lives -- and does not mean that 50 percent of men are batterers. What happens is that men are serial batterers. They go and they're allowed to get-- They're released by the system again to find-- if that women gets out -- to find a new victim. That's why it is essential that the registry that you've provided for in A-1367 be established.

If A-1368 also passes, then obviously all of the orders that are entered in this State will come under that. I think that one of the things that is going to be very important is that that is adequately funded, and so I would just urge this Committee to take a careful look -- this Council and the

substantive Committees that hear the bill -- to take a careful look at whether the funding is adequate for the bill. And to consider, perhaps-- One of the things that was suggested at women's summit last year was a surcharge not only on guns, which this provides for, which can be bought illegally without the surcharge, but on ammunition, which generally is not bought under the table. So that may be a source of funding for that.

ASSEMBLYWOMAN HECK:

It could be an amendment, Loretta. Because, you know, appropriations will never hear it.

ASSEMBLYWOMAN WEINBERG: That's a good idea.

MS. GRIFFIN:

The other suggestion I had was just that the current bill, A-1367, only requires the registry of orders, that are entered under the new law.I would suggest that persons who have orders that are still in force under the old law be allowed to come in and enter those orders into the regristry, as well as orders from other states.

There are a lot of women who try to escape abuse by coming across the state lines. If they come into New Jersey and they are battered here by a batterer who follows them, I think it's essential that there be a record that there is an in order in another state, either restricting that person from having a firearm or just being a perpetrator.

So I would just suggest that the registry be broadened a little bit to include women who want to register orders that are--

ASSEMBLYWOMAN HECK: Let's look at those things--

ASSEMBLYWOMAN WEINBERG:

We would probably need some kind of an interstate compact for that to take place. In order for New York or Connecticut or Pennsylvania, for instances, to notify--

MS. GRIFFIN:

Well, I wasn't meaning that the state should notify. I meant that if the woman comes into the State she should be able to go to the police officer and say, you know, let's -- can I put this on the registry so that you can find him if he tries to buy a gun here?

ASSEMBLYWOMAN. HECK:

She should say they have X,Y and Z.

ASSEMBLYWOMAN WEINBERG:

Sure, so at the request of the victim in this case.

Okay, good.

MS. GRIFFIN: That's right.

Thank you very much.

ASSEMBLYWOMAN HECK: Thank you.

Does anyone else wish to--

Yes?

NANCY KESSLER:

Hi, my name is Nancy Kessler. I'm from the Administrative Office of the Courts. I forwarded some material to your staff with regard to the registry, and I just wanted to be available if you had any questions about the material, and, perhaps, to just make some suggestions.

ASSEMBLYWOMAN HECK:

Yes, we just received that, and I know that I haven't had a chance to review it. I appreciate the fact that you have done that. Perhaps, we can meet in Trenton with Loretta or perhaps--

MS. KESSLER:

That would be wonderful. The materials support what Melanie was already talking about--

ASSEMBLYWOMAN HECK:. Very good.

MS. KESSLER:

--in terms of extending the registry.

ASSEMBLYWOMAN WEINBERG: Extending it to allow somebody to enter it.

MS. KESSLER: Well, to support her extensions, but also to not only register orders that include prohibition against weapons possession, but to register all domestic violence restraining orders.

There was a bill in last session that was introduced, I

think, by Assemblyman Azzolina, and we had done an extensive analysis of what the cost would be for that bill. Now, if Assembly Bill No. 1368 passes, in effect, you would be doing the same thing. But if it doesn't, Assembly Bill No. 1367 would be more limited than his bill had been.

The judiciary is already involved in a much smaller way in trying to come up with a comprehensive registry. We thought that we would like to bring to your attention that fact that the other bill would actually involve recording all restraining orders and making that information available on a 24-hour basis to all law enforcement officers and to other people who are in the position of having to enforce those orders.

ASSEMBLYWOMAN HECK:

So why won't we meet with Nancy, or at least begin the process. All right? Or at least have staff meet and then--

MS. KESSLER: That would be great. Okay. Thank you.

ASSEMBLYWOMAN HECK: We'll be in touch.

Thank you very much, Nancy.

ASSEMBLYWOMAN WEINBERG:

Nancy, thank you very much.

ASSEMBLYWOMAN HECK: Does anyone else wish to speak? (no response)

What time is it?

MS. SVEDOSH: It's 3:00.

ASSEMBLYWOMAN HECK:

I think we're going to close with some words from Loretta, and then Joanna.
Loretta?

ASSEMBLYWOMAN WEINBERG:

Well, I'll just repeat what I said a little earlier. I appreciate the opportunity to participate in this. Domestic violence has been something -- the legislation concerning domestic violence -- I mean, has very close to my heart for a number of years, as one of the founding Board Members of Shelter Our Sisters in Bergen County, which is the domestic violence shelter that we have located in the community in which I live, as a matter of fact, and their annual brunch is being held this Sunday. *The Bergen Record* is one of recipients of awards because of the outstanding job that they have done on their series on domestic violence.

So this is an important issue. I think Rose pointed out, though, it tends to take a back seat in the press of other businesses or whatever, what I fondly call the crime of the week.

So, you know, if they've done a series on juvenile justice, then everybody bends over backwards to do something on juvenile justice. Those of you in the audience and your contacts are the people that we depend upon to help us bring this to the forefront. You have got to keep those letters coming, particularly to the Chairs of the Judiciary Committees, where these bills are.

It's not that anybody intentionally pushes it to the bottom of the pile but the-- I have a friend who always says

same backwards, "The greasy wheel gets squeaked." In this case,"The greasy wheel will get squeaked," unless we really pull out all the stops and keep this in the forefront of the importance of passing this legislation and of moving it through Legislature. And I know, with the cooperation of Rose Heck and Joanna, as a newer member of the group -- and I'm delighted to see her -- that we're going to see something done in all of these areas.

Thank you.

ASSEMBLYWOMAN HECK: Thank you, Loretta. Joanna?

ASSEMBLYWOMAN GREGORY-SCOCCHI: Yes, I'd also like to, number one, thank the Committee and Rose. Just the few sessions that I have been sitting in on have been extremely gratifying for me, as somebody from Middlesex County who has involved in women's groups and women's issues for a number of years. I am very gratified to be sitting here on this Committee. Hopefully, not even hopefully -- it will happen; we will push these issues through. They must be done -- we must start to--

The tremendous work that this Committee has done last year, that I've heard all about and the -- just the commitment that the members of this Committee and not only the members of this Committee but all of the groups throughout the State of New Jersey that I have met, from Bergen County to Lower South Jersey, and now hearing the groups from my own, Middlesex County, who are sitting in this room today -- we all have commitment and that's extremely important that we all work together. Even the ceremony yesterday "Take your Daughters to Work Day," certainly showed how we're starting to finally get these groups and support each other, and we must continue that

fight.

Hopefully, Senator Gormley, like Loretta mentioned, will post this bill. Your letter writing campaigns, and your coming to our Committee hearings, and your coming to Trenton to support our work are so important because, without your help and without your voices down in Trenton, maybe it does get pushed to the side. We cannot allow that to happen anymore. These issues are too important, especially the Rape Shield bill I feel so strongly about and I know that Harriet Derman feels strongly about, also.

So we look forward to seeing you, again, down in Trenton and again, thank you members of this Committee, especially Rose.

ASSEMBLYWOMAN HECK:

You're very welcome.

I really have great faith in each of us serving on this Advisory Council. The people on it are very dedicated to making certain that good things happen. We promoted the displaced homemakers bill last year, and that became a reality. We're very pleased about that.

We're certain, I mean, I really mean certain that we're going to move the domestic violence bills through. We have an agenda; there is no doubt about it. The fact that we are orchestrating the various groups to come together as one voice and a strong effort, we're going to make this happen. And we're going to do it and do it right.

I really believe that your bill will become law and crime victims will be -- their pain will be eased. I truly

believe that the domestic violence issue is in -- even when the new pieces become law -- we'll see some assistance given. But I'm afraid that the fallout of all the pain of all the victims will be with us for maybe another generation, unfortunately, because our children have experienced so much, and the ill effects are being witnessed by the fact that we do have children on the street causing pain themselves.

I think early intervention, as we've spoken about, Loretta, is a must today because there is something happening in our society that has to be addressed immediately. And immediately is not soon enough, because we, as I said, have our children hurting other children, our children thinking in terms of what they will wear when they die. I mean, you know, life is precious. I don't believe children have that kind of a happy outlook anymore.

People in certain areas are experiencing pain. to such a degree that that kind of pain that they see, that they witness, they believe is the way of life. We see that in our number of suicides involved in the various areas. So I believe that women will lead the way, as we have as mothers. I have to say this, because I believe we are the caretakers. I don't think that will ever change. I think that men have joined us in our search to make the world better. I truly believe that the women are the ones who will lead the way to solving the problems.

I'm very grateful to all who came today and hopefully we'll get this moving, as well as the other issues on May 19. Thank you very much for coming.

(HEARING CONCLUDED)

Supreme Court, U.S.
FILED
DEC 22 2003
OFFICE OF THE CLERK

No. 03-598

IN THE

Supreme Court of the United States

STATE OF NEW JERSEY,

Petitioner,

v.

ANDERSON GARRON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Respondent Anderson Garron respectfully submits that the petition for a writ of *certiorari* should be denied for the following reasons. Firstly, the New Jersey Supreme Court's ruling essentially addressed the misapplication of a state statute by a state trial court. Put simply, the New Jersey Supreme Court ruled that the trial court misapplied the New Jersey Rape Shield Statute and, in so doing, kept from the jury highly relevant evidence, evidence that was necessary for a fair determination of the trial issues. As such, the petition for a writ of *certiorari* should be denied pursuant to Rule 10 of the Rules of the Supreme Court of the United States, which sets forth the principle that "a petition is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."

Secondly, the New Jersey Supreme Court's ruling that "if evidence is relevant and necessary to a fair determination of the issues, the admission of the evidence is constitutionally compelled," is in complete accordance with state and federal constitutional jurisprudence. Pet., App. at 22a – 23a. Thus, the New Jersey Supreme Court properly reformulated the New Jersey Rape Shield Statute to ensure that it did not violate defendant's right to confront witnesses against him, right to compulsory process, and right to a fair trial. Since the ruling does not conflict with relevant decisions of this Court (or other state or federal courts for that matter), there is no valid reason to grant the petition for a writ of *certiorari* under Supreme Court Rule 10(c).

Lastly, the New Jersey Supreme Court's decision does not have any far-reaching implications. The Court's decision did not strike down the Rape Shield Statute, but rather struck a balance between "defendant's right to confrontation and to the compulsory process of witnesses, and the victim's right to be free from an unnecessary invasion of her privacy." Pet., App. at 2a. Moreover, the Court's decision does not conflict with the decisions of any state or federal courts. Furthermore, the Court's decision cannot even be characterized as far-reaching in New Jersey, as the Court expressly

stated that the decision was "limited to its unique facts." Pet., App. at 28a. Accordingly, the writ should be denied due to the lack of far-reaching, national implications.

In actuality, the petition for a writ of *certiorari* represents a thinly-veiled piece of victim's rights propaganda, pandering to the victim's rights movement at the expense of legitimate constitutional concerns. The petition couches the ruling of the New Jersey Supreme Court as "emblematic of a national phenomenon demanding global action only this Court can take." Pet. at 7. Yet, Petitioner cites no federal or state court decisions striking down Rape Shield Statutes at the expense of putative rape victims. To the contrary, the law cited by Petitioner is inapposite and addresses areas with categorical preclusions of evidence, such as scientific polygraph evidence, that have no applicability here. The fact of the matter is that the New Jersey Supreme Court's decision in *State v. Garron*, 177 N.J. 147, 827 A.2d 243 (2003) was sound in all respects and does not require further review.

. . .

A Cumberland County Grand Jury indicted Respondent Anderson Garron for first-degree aggravated sexual assault pursuant to N.J. Stat. Ann. 2C:14 – 2a(4), third-degree aggravated sexual contact pursuant to N.J. Stat. Ann. 2C:14 – 3a, and second-degree official misconduct pursuant to N.J. Stat. Ann. 2C:30 – 2a, arising out of a sexual encounter between Respondent Anderson Garron, a Bridgeton Police Officer, and J.S., a former secretary at the Cumberland County Prosecutor's Office. From the inception of the case, the "precise nature of that encounter was sharply contested by J.S." and Respondent. Pet., App. at 2a. J.S. contended that she was forcibly raped during the encounter. Conversely, Respondent Anderson Garron steadfastly maintained his innocence and repeatedly, consistently and emphatically asserted that any sexual relations that had occurred during the encounter were consensual.

In support of his consent defense, Respondent Anderson Garron "sought to introduce testimony concerning J.S.'s conduct toward him in the years leading up to what he claims was a voluntary sexual

encounter." Pet., App. at 3a. Specifically, Respondent sought to introduce testimony that would demonstrate that there was a continuing course of conduct between J.S. and Respondent, which led Respondent to reasonably believe that J.S. freely and affirmatively consented to the sexual activity of which she complained. *See* N.J. Stat. Ann. 2C:14 – 7d. Respondent sought to introduce this crucial testimony under New Jersey's Rape Shield Statute, which provides in pertinent part:

> a. In prosecutions for aggravated sexual assault, sexual assault, aggravated criminal sexual contact, criminal sexual contact, . . . evidence of the victim's previous sexual conduct shall not be admitted or a reference made to it in the presence of the jury except as provided in this section. . . . *If the court finds that evidence offered by the defendant regarding the sexual conduct of the victim is relevant and highly material and meets the requirements of subsections c and d of this section and that the probative value of the evidence offered substantially outweighs its collateral nature or the probability that its admission will create undue prejudice, confusion of the issues, unwarranted invasion of the privacy of the victim, the court shall enter an order setting forth with specificity what evidence may be introduced and the nature of the questions which shall be permitted, and the reasons why the court finds that such evidence satisfies the standards contained in this section. The defendant may then offer evidence under order of the court.*
>
> *b. In the absence of clear and convincing proof to the contrary, evidence of the victim's sexual conduct occurring more than one year before the date of the offense charged is presumed to be inadmissible under this section.*
>
> . . .

> *d. Evidence of the victim's previous sexual conduct with the defendant shall be considered relevant if it is probative of whether a reasonable person, knowing what the defendant knew at the time of the alleged offense, would have believed that the alleged victim freely and affirmatively permitted the sexual behavior complained of.*

N.J. Stat. Ann. 2C:14-7(a), (b), (d) [emphasis added].

Pursuant to the dictates of the Rape Shield Statute, the trial court held a pretrial hearing to determine the admissibility of the proffered evidence regarding the past relationship between J.S. and Respondent. At the hearing, Respondent presented five witnesses. Respondent Anderson Garron testified that J.S. would kiss him, hug him, brush-up against him, flirt with him, and grab his buttocks. Further, Respondent Garron testified that J.S. made a multitude of comments indicating a strong desire to freely and to voluntarily engage in consensual sexual relations with him. The comments included, "are you ready to have an affair." *See* Pet., App. at 3a – 5a.

Respondent's wife, Stephanie Garron, who was a detective at the Cumberland County Prosecutor's Office, testified and corroborated Respondent's testimony. She testified that J.S. would kiss, hug, brush-up against, and touch Respondent, as well as grab Respondent's hand and attempt to pull him away. Moreover, Mrs. Garron testified that J.S. made a number of comments indicating a strong desire to engage in consensual sexual relations with Respondent, including "I'll take that man away from you if he spends just one night with me," "Is that your gun or are you happy to see me," and other blatant remarks about having an affair with Respondent. *See* Pet., App. at 5a – 6a.

Wendy Frost, a secretary in the Cumberland County Prosecutor's Office provided testimony that corroborated the Garrons' account with respect to the inappropriate touching of Respondent by J.S., as well as the inappropriate comments. Ms. Frost even indicated that J.S. stated that she was going to take Respondent away from his wife. *See* Pet., App. at 6a – 7a. Similarly,

Terri Seay, another secretary at the Cumberland County Prosecutor's Office, testified in a manner that corroborated the Garrons' testimony and that provided further evidence of a course of conduct indicating a strong desire to freely and voluntarily to engage in consensual sexual relations with him. *See* Pet., App. at 7a. Thus, in summary, all of the witnesses consistently testified that J.S. had engaged in a course of sexual conduct with Respondent. *See* Pet., App. at 3a – 8a.

In a written opinion, the trial court held that Respondent had offered clear and convincing proof that overcame the presumption against the admission of sexual conduct of the victim more than one year prior to the alleged incident. *See* Pet., App. at 120a.

> *The defendant has offered clear and convincing proof of prior sexual conduct that overcomes the presumption against the admission [of] sexual conduct of the victim more than one year prior to the alleged incident. The Court agrees with the defendant's position that although the three incidents of sexual conduct occurred prior to the one year limitation, the evidence the defendant intends to offer shows a continuing course of conduct on the part of J.S. to engage in sexual conduct with the defendant. In the Court's opinion, the defendant has overcome the presumption.*

Ibid. [emphasis added].

After so holding, despite the fact that the Court found clear and convincing evidence and found that such evidence showed a continuing course of conduct, the trial court inexplicably parsed the conduct and only permitted the admission of three, isolated, unrelated "instances of sexual conduct." *See* Pet., App. at 119a – 121a. The trial court admitted evidence that J.S. had grabbed Respondent's buttocks in 1995 or 1996, that J.S. had kissed Respondent passionately in March of 1997, and that J.S. had kissed Respondent passionately on another occasion in 1998, after he had resolved an

outstanding bench warrant for her. The trial court found that these three, isolated, unrelated incidents were admissible under N.J. Stat. Ann. 2C:14 – 7d in that they showed that J.S. consented to the sexual conduct by demonstrating "a continuing course of conduct on the part of J.S. to engage in sexual conduct with the [Respondent]." Even though the trial court admitted these three, isolated, unrelated instances of conduct, their admission was totally out-of-context and did not illustrate the "course of conduct" that the trial court had found by clear and convincing evidence.

Although the remaining testimony directly impacted on the central issue in the case, consent, the trial court excluded both the evidence of sexual conduct and the evidence of statements made by J.S. indicating her consent. The trial court inexplicably concluded that the remainder of the conduct was "flirtatious" as opposed to sexual conduct and was not probative of whether J.S. consented to the sexual activity. As a result of the trial court's ruling, Wendy Frost and Terri Seay were barred from testifying at trial with respect to the course of sexual conduct and with respect to the statements made by J.S., statements which clearly gave rise to the reasonable inference that J.S. freely and affirmatively permitted the sexual activity. Additionally, the trial court severely limited the testimony of Respondent Anderson Garron and Respondent's wife.

At trial, J.S. testified that Respondent forced her to engage in oral sex. With respect to prior sexual conduct with Respondent, J.S. testified that she never kissed Respondent in a passionate manner, that she never touched Respondent's buttocks, and that she never touched Respondent anywhere on his body. Respondent attempted to rebut this testimony through his testimony and that of his wife, however, was not permitted to call any of the neutral, objective witnesses (e.g., Wendy Frost and Terri Seay) that could corroborate his account of the kissing and touching.

Furthermore, at trial, Respondent testified that he was innocent and that all sexual activity between J.S. and him was consensual. The entire case came down to a credibility determination, whereby

the jury had to choose to believe either Respondent or J.S. The trial court's ruling that Respondent Garron had proven, by clear and convincing evidence, a continuing course of conduct on the part of J.S. to engage in sexual conduct with Respondent could not co-exist with its subsequent exclusion of almost the entirety of the conduct. As stated, the end result was that J.S. was permitted to tell her story, while Respondent was severely restricted. Instead of being able to apprise the jury as to the reason that he believed J.S. freely and affirmatively consented and to testify to this continuing course of sexual conduct, he was forced to testify to isolated, unrelated incidents that did not present a full picture. In fact, in isolation, the incidents made little sense. As such, the jury made the necessary credibility determination without truly hearing Respondent's version of historical events.

Having received an inaccurate and incomplete picture of events leading up to the September 28, 1998 sexual encounter, not surprisingly, the jury convicted Respondent as to all counts. In turn, the trial court rendered imposition of sentence. On count one, aggravated sexual assault, Respondent was sentenced to 11 years in the New Jersey State Prison with a three and two-thirds year period of parole ineligibility pursuant to the Graves Act, codified under N.J. Stat. Ann. 2C:43 – 6(c). On count two, aggravated sexual contact, Respondent was sentenced to three years in the New Jersey State Prison with a one-year period of parole ineligibility under the Graves Act. On count three, official misconduct, Respondent was sentenced to six years in the New Jersey State Prison. Although the counts did not merge, the sentences on all three counts were to run concurrently. In addition, the trial court applied the No Early Release Act pursuant to N.J. Stat. Ann. 2C:43 – 7.2 and imposed the requisite 85% period of parole ineligibility and a five-year period of parole supervision. Finally, the trial court indicated that Respondent's convictions for aggravated sexual assault and aggravated sexual contact subjected him to Megan's Law reporting requirements under N.J. Stat. Ann. 2C:7 – 1, *et seq*.

After sentencing, Respondent immediately filed an appeal, challenging, among other things, the trial court's ruling under the Rape Shield Law. Petitioner, State of New Jersey, failed to file a cross-appeal and did not challenge the trial court's initial piercing of the Rape Shield Statute. Thus, presumably, Petitioner conceded that the trial court properly pierced the Rape Shield Statute. The issue in the Superior Court of New Jersey, Appellate Division, therefore, was whether the trial court properly applied the Rape Shield Statute.

In an unpublished opinion, the majority of the Appellate Division (*Per Curiam*) affirmed the judgment of conviction in all respects and found that the trial court properly had applied the Rape Shield Statute. In a dissent, Judge Wecker found that the trial court had committed reversible error in excluding under the Rape Shield Statute, N.J. Stat. Ann. 2C:14 – 7, highly relevant evidence that went to the heart of the consent defense. *See* Pet., App. at 103a – 105a. In particular, Judge Wecker presciently stated:

> *The jury heard about three incidents of physical contact which the judge deemed relevant, but the jury never heard substantial available evidence from several witnesses of J.S.'s explicit verbal invitations to defendant. And the jury heard only a fraction of the available evidence from several witnesses of J.S.'s expressed desires with respect to him, that coming from Mrs. Garron and not from two independent witnesses. The entirety of J.S.'s remarks, if known to and believed by the jury had the potential for creating reasonable doubt in the mind of at least one juror. To artificially distinguish past encounters between the defendant and J.S. on the ground that some were "merely flirtatious" reflects a failure to appreciate the legitimate and compelling purpose for which the evidence was offered.*

See Pet., App. at 104a [emphasis added]. Based upon the dissent, Respondent appealed to the Supreme Court of New Jersey as a

matter of right under R. 2:2 – 1(a)(2). The issue, again, was the application of the New Jersey Rape Shield Statute by the trial court.

The New Jersey Supreme Court expressly stated that the issue was whether the trial court properly applied the Rape Shield Statute. After so stating, the State Supreme Court applied the state statute and determined that the trial court had erred in its exclusion of the necessary, crucial, relevant evidence pertaining to consent. Thereafter, the New Jersey Supreme Court went on to reformulate the New Jersey Rape Shield Statute in accordance with state and federal constitutional precedent and to apply the reformulated statute to the same effect.

REASONS FOR DENYING THE PETITION

I. THE WRIT SHOULD BE DENIED, AS THE NEW JERSEY SUPREME COURT'S RULING PRIMARILY DETERMINED THAT THE TRIAL COURT *MISAPPLIED* THE NEW JERSEY RAPE SHIELD LAW AND, IN SO DOING, KEPT FROM THE JURY HIGHLY RELEVANT EVIDENCE THAT WAS NECESSARY FOR A FAIR DETERMINATION OF THE CASE.

From the outset, the New Jersey Supreme Court framed the issue before the Court as an issue of application:

> *We must determine whether the trial court properly applied the Rape Shield Statute, N.J. Stat. Ann. 2C:14 – 7, in excluding evidence of the victim's past relationship with defendant.* Defendant claims that the excluded evidence would have explained the events leading to the sexual encounter and to the victim's consent and, therefore, was critical to a fair trial. The State claims that the victim's prior conduct did not possess sufficient probative value on the ultimate issue before the jury, whether the defendant forced the victim to perform a sexual act against her will. In these competing arguments are found the tension between

> defendant's right to confrontation and compulsory process of witnesses, and the victim's right to be free from an unnecessary invasion of privacy. *We conclude that the trial court misapplied the Rape Shield Statute in keeping from the jury* ***highly*** *relevant evidence that was necessary for a fair determination of the case and, therefore, reverse and remand for a new trial.*

1a – 2a [emphasis added]. In essence, the New Jersey Supreme Court ruled that the trial court misapplied the New Jersey Rape Shield Statute and, in so doing, kept from the jury highly relevant evidence, evidence that was necessary for a fair determination of the trial issues. Therefore, the New Jersey Supreme Court's ruling at its heart involves the *misapplication* of a state statute by a state trial court.

In applying the Rape Shield Statute to the facts, the Supreme Court stated:

> One view is that she engaged in office buffoonery, bawdy humor, and innocent but self-indulgent attention seeking. Another view is that she aggressively pursued defendant using humor as a thinly-veiled cover for her sexual advances. The jury was particularly well suited to divine the true meaning of the language and conduct of J.S. . . . In this case, "[t]he role of the factfinder [was] to decide . . . whether . . . defendant's belief that the alleged victim had given affirmative permission was reasonable." *State in the Interest of M.T.S.*, 129 N.J. 422, 448 (1992). *Defendant's state of mind was directly at issue. How defendant's prior relationship with J.S. affected his state of mind was critical to the ultimate determination of the jury.*
>
> *The trial judge permitted only fragmented pieces of evidence to be presented to the jury concerning J.S.'s relationship with defendant. The judicial censorship did more than distort the true picture of events*

leading to the sexual encounter, it made it less likely that the jury would believe any part of the defense of consent. The trial court allowed testimony by the defendant concerning J.S.'s two passionate kisses and her grabbing his derriere. However, J.S. denied that those events ever occurred. Therefore, the truth regarding those incidents and the sexual encounter was reduced to a credibility contest between just two people. Without the testimony of independent witnesses from the Cumberland County Prosecutor's Office who were able to give examples of J.S.'s public shows of affection toward defendant, it was less likely that the jury would believe that J.S. passionately kissed defendant and grabbed his buttocks, and that in turn made it less likely that the jury would find believable defendant's consent defense. Had J.S. contradicted Frost and Seay's testimony describing J.S.'s physical advances toward defendant, as well as her sexually alluring remarks, the case would not have boiled down to a "he said-she said" dispute. *The credibility determination between J.S. and defendant may well have hinged on the presentation of seemingly disinterested witnesses whose testimony had no partisan flavor, testimony that would have buttressed defendant's assertions. Each piece of evidence delicately supported another in the presentation of the consent defense, and the removal of key pieces of evidence presaged the total collapse of that defense. Applying another metaphor, the jury was given a book with missing chapters.*

. . .

In this case, the information withheld from the jury did not concern the victim's intimate relations with persons other than this defendant. The withheld evidence did not paint the victim as a woman with a sordid past, making her allegations unworthy of belief. The withheld

evidence, however, did shed light on the victim's relationship with defendant. However, unflattering or embarrassing the details, the evidence was offered for a legitimate objective, to support defendant's consent defense. The story left untold by defendant was of a woman infatuated with him and who pursued him aggressively, even in the presence of her fellow office workers and his wife. The defendant needed to explain why he was at the victim's house in the early morning of September 28, why he followed her into the laundry room of her home, and why he reasonably believed she consented to have sexual relations with him. *The untidy details of defendant's relationship with J.S. were essential to understanding his side of the story. Selectively editing those details, as the trial court did here, did not advance the truth-seeking function of the trial.*

. . .

The verbal and physical conduct, both sexual and flirtatious, was, for the most part, inextricably intertwined in a course of conduct over a six-year period.

. . .

The trial judge found at the Rape Shield hearing that defendant had presented clear and convincing proof of "a continuing course of conduct on the part of J.S. to engage in sexual conduct with the defendant." However, by excluding the vast majority of that evidence, the jury had no inkling of the course of conduct and was left to evaluate the conflicting versions of the incident in question within the confines of the contested buttocks-grabbing and two passionate kisses, each of which occurred more than one year apart and appeared to be wholly unrelated to each other and to the incident in question. The excluded evidence of J.S.'s conduct was relevant

> *and necessary for a fair determination of the witnesses' relative credibility and on the ultimate issue of consent. We therefore conclude that the exclusion of the evidence was "clearly capable of producing an unjust result," R. 2:10-2, and reverse and remand for a new trial.*

Pet., App. at 24a – 25a, 27a, 28a, 30a [emphasis added].

Unquestionably, the crux of the New Jersey Supreme Court's ruling involved the application of the New Jersey Rape Shield Statute. As Petitioner notes, the New Jersey Supreme Court "reformulated" the New Jersey Rape Shield Statute in a manner consistent with the pre-1994 amendment. Prior to the 1994 amendment, the Rape Shield Statute required that the evidence be "relevant" and that the evidence's probative value not be "outweighed" by its collateral nature, confusion of the issues or an unwarranted invasion of the victim's privacy. The 1994 amendment required that the evidence be "relevant and highly material" and that the evidence's probative value "substantially outweigh" the above-listed collateral-confusion-privacy concerns. Thus, the difference between the two versions of the Rape Shield Statute comes down to the modifiers "highly" and "substantially."

However, Petitioner fails to recognize that the New Jersey Supreme Court applied both the pre- and post-1994 amendment versions of the statute. For example, in the beginning of its opinion, the Court concluded that the trial court "misapplied the Rape Shield in keeping from the jury *highly* relevant evidence that was necessary for a fair determination of the case." Pet. at 1a – 2a. Subsequently, the Court dispensed with the modifier "highly" and simply found that the trial court improperly excluded evidence of J.S.'s conduct that "was relevant and necessary for a fair determination of the witnesses' credibility on the ultimate issue of consent." Pet. at 30a. Under the application of either version of the Rape Shield Statute, regardless of the modifiers utilized by the New Jersey Supreme Court, the application was the same – the New Jersey Supreme Court ruled that the trial court's erroneous exclusion of highly

relevant (or merely relevant) evidence that was necessary for a fair trial mandated reversal of the judgment of conviction and remand for a new trial. There is no reason to grant the writ if the result remains the same under either version of the statute. Furthermore, there is no reason to grant the petition for a writ of *certiorari* when the New Jersey Supreme Court's ruling, at its essence, addressed the *misapplication* of a state statute by a state trial court.

Based upon the foregoing, the petition for a writ of *certiorari* should be denied pursuant to Rule 10 of the Rules of the Supreme Court of the United States, which sets forth the principle that "a petition is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Additionally, the petition for a writ of *certiorari* should be denied for lack of jurisdiction pursuant to 28 U.S.C. § 1257(a), as the application of the state statute is the primary issue addressed below.

II. THE WRIT SHOULD BE DENIED, AS THE NEW JERSEY SUPREME COURT PROPERLY REFORMULATED THE NEW JERSEY RAPE SHIELD STATUTE TO ENSURE THAT IT DID NOT VIOLATE RESPONDENT'S RIGHT TO CONFRONT WITNESSES, RIGHT TO COMPULSORY PROCESS AND RIGHT TO A FAIR TRIAL.

In New Jersey, whenever a defendant asserts that the exclusion of evidence under the Rape Shield Law violates his state and federal constitutional rights, such as the right to confrontation, to cross-examination, to compulsory process, to a fair trial, and so forth, the exclusion of such evidence must be closely scrutinized. *State v. Budis*, 125 N.J. 519 (1991) (citing *Chambers v. Mississippi*, *infra*, 410 U.S. at 295). In so doing, the New Jersey Supreme Court consistently has held that a two-step analysis must be employed:

> *First, we must ascertain, apart from the rape shield statute, whether the evidence was relevant*

> *to the defense. If the evidence is relevant, we then must decide whether its probative value outweighs its prejudicial effect. If so, the evidence may not constitutionally be excluded.*

State v. Budis, 125 N.J. at 532 [emphasis added]; *see also State v. Cuni*, 159 N.J. 584, 600 (1999).

The New Jersey Supreme Court employed this two-step analysis in *State v. Budis*, 125 N.J. at 527. In this aggravated sexual assault case involving a minor victim, the defendant moved to introduce details of prior sexual abuse committed by the victim's step-father. The trial court barred the introduction of such evidence under the Rape Shield Statute and significantly restricted defendant's cross-examination of the victim and the assigned-detective. *Id.* at 532. On appeal, the New Jersey Supreme Court found that the prior abuse was relevant for two reasons.

> First, it rebuts that inference that T.D. acquired the knowledge to describe the sexual matters from her experience with defendant. Second, the evidence is relevant to show that T.D. had the knowledge to initiate the sexual acts as described by defendant.

Id. at 534. Additionally, the Court determined that there was no undue prejudice in admitting the evidence.

> We are sensitive to the possibility that evidence of T.D.'s prior abuse may invade her privacy and cause her anxiety or embarrassment. On balance, we believe that these factors do not outweigh the significant probative value of the evidence.

Id. at 540. The New Jersey Supreme Court held that the evidence of past abuse should have been admitted and that its non-admission constituted reversible error. *Id.* at 541.

The ruling in *Budis*, *supra*, stands for the proposition that "neither statutes nor evidence rules may bar defendant from using evidence and material relevant to his defense where the bar would violate the

constitutional right to confront and cross-examine witnesses." Cannel, *New Jersey Criminal Code Annotated*, comment 4 on N.J. Stat. Ann. 2C:14 – 7d (Gann 2003). As a result of the proposition, "the list of particular subjects in the [Rape Shield Statute] is treated as illustrative rather than exhaustive." The New Jersey Courts have not hesitated to admit evidence not particularly set forth in the statute in order to protect defendants' constitutional rights, including the right to confront and cross-examine witnesses. *See, e.g., State v. Bray*, 356 N.J. Super. 485, 494 – 96 (App. Div. 2003) (recognizing that the Confrontation Clause requires the admission of prior sexual abuse of a child victim to demonstrate an alternate source of sexual knowledge); *State v. G.S.*, 278 N.J. Super. 151, 169 (App. Div. 1994), *rev'd on other grounds*, 145 N.J. 460 (1996) (finding that barring a witness from testifying as to facts in the indictment would be improper); *State v. W.L.*, 278 N.J. Super. 295 (App. Div. 1995) (permitting use of diaries of child-victim to support theory that another sexually abused victim); *State v. Ross*, 249 N.J. Super. 246 (App. Div. 1991) (permitting testimony about prior sexual abuse, for precluding such an inquiry would deny defendant his right to cross-examination); *State v. Ogburne*, 235 N.J. Super. 113, 117 (App. Div. 1989) (permitting inquiry with respect to possible source of pubic hair found on bedclothes).

In sum, New Jersey Courts have long adhered to the proposition that, if the evidence is relevant and necessary to a fair determination of the issues, then the admission of such evidence is constitutionally compelled. *See* Pet., App. at 22a. New Jersey's approach is in complete accordance with this Court's jurisprudence.

Both the New Jersey and United States Constitutions guarantee defendants "a meaningful opportunity to present a complete defense." Pet., App. at 19a (quoting *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 2146, 90 L. Ed. 2d 636, 645 (1986)). The opportunity to present a

complete defense "would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on . . . credibility . . . when such evidence is central to the defendant's claim of innocence." Pet., App. at 19a (quoting *Crane v. Kentucky*, 476 U.S. at 690, 106 S. Ct. at 2147, 90 L. Ed. 2d at 645).

The Sixth Amendment of the United States Constitution, and Article I, Paragraph 10 of the New Jersey Constitution guarantee the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." U.S. Const., Amends. VI & XIV; N.J. Const., Art. I, Para. 10; *See also Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965).

> Confrontation means more than being allowed to confront the witness physically. 'Our case is construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination.' *Douglas v. Alabama*, 380 U.S. 415, 418(1965).
>
> . . .
>
> [Cross-examination] is the principal means by which the believability of a witness and truth of his testimony is tested. . . . [T]he cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness . . . A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing the possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand . . . We have recognized that the exposure of a witness' motivation in testifying is an important function of the constitutionally protected right of cross-examination. *Greene v. McElroy*, 360 U.S. 474, 496 (1959).

Davis v. Alaska, 415 U.S. 308, 315-16 (1974).

Thus, an accused's constitutionally protected right to confront and cross-examine witnesses against him is "more than a desirable rule of trial procedure." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973).

> [Cross-examination] is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process.' It is, indeed, 'an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.' [I]ts denial or significant diminution calls into question the ultimate " 'integrity of the fact-finding process' " and requires that the competing interest be closely examined.

Id. [Citations omitted].

In addition to an accused's fundamental right to confront and cross-examine witnesses against him, it is axiomatic that an accused may also present a defense and call witnesses on his own behalf. *See, e.g., Webb v. Texas*, 409 U.S. 95 (1972); *Washington v. Texas*, 388 U.S. 14, 19 (1967). In fact,

> few rights are more fundamental than that of an accused to present witnesses in his own defense.

Chambers v. Mississippi, 410 U.S. at 303.

It was in this light that the New Jersey Supreme Court scrutinized the constitutionality of the 1994 amendment to the Rape Shield Statute. As stated, the New Jersey Rape Shield Statute was amended in 1994 "to strike an appropriate balance between protecting a defendant's constitutional rights and protecting a rape victim from an assault upon the victim's character." Pet., App. at 18a. Prior to the amendment, the statute required that the evidence be

> *Relevant and that the probative value of the evidence offered is not outweighed* by its collateral nature or by the probability that its admission will

> create undue prejudice, confusion of the issues, or unwarranted invasion of privacy of the victim.
>
> And material to negating the element of force or coercion.

Pet., App. at 18a (citing N.J. Stat. Ann. 2C:14 – 7a & c (1988) [emphasis added]). The amended Rape Shield Statute required that the evidence be

> *Relevant and highly material and meet [ ] the requirements of subsection . . . d . . . and that the probative value of the evidence offered substantially outweigh* [ ] its collateral nature..

Pet., App. at 18a (citing N.J. Stat. Ann. 2C:14 – 7a (1994) [emphasis added]). The New Jersey Supreme Court stated:

> An unconstrained reading of the Statute leads to the exclusion of prior sexual conduct unless it is highly material and its probative value substantially outweighs its prejudicial effect. . . . Accordingly, evidence of prior sexual conduct that is only material (not highly material) and that has probative value outweighing (not substantially outweighing) its prejudicial impact would not be admissible at trial. *That formulation would keep from the jury evidence that is admissible under the Confrontation and Compulsory Process Clauses, and the constitutional standards enunciated in Budis. We must construe the statute so that its reach does not exceed its constitutional limits. We reaffirm the test advanced in Budis that evidence relevant to the defense that has probative value outweighing its prejudicial effect must be placed before the trier of fact. We do not read the Shield Statute in a way that would deny a defendant a fair trial. In summary, evidence that is relevant and necessary to prove the defense of consent is not excluded under the Shield Statute.*
>
> . . .

> *Stated in a different way, if evidence is relevant and necessary to a fair determination of the issues, the admission of the evidence is constitutionally compelled.*

Pet., App. at 22a – 24a.

Thus, the New Jersey Supreme Court properly reformulated the New Jersey Rape Shield Statute to ensure that the it did not violate Respondent's right to confront witnesses against him, right to compulsory process, and right to a fair trial. The Court's ruling – that "if the evidence is relevant and necessary to a fair determination of the issues, the admission of the evidence is constitutionally compelled" – remains completely consistent with state and federal jurisprudence. Pet., App. at 22a.

Petitioner argues that the Supreme Court of New Jersey failed to apply the analysis set forth in *United States v. Scheffer*, 523 U.S. 303, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998), wherein this Court stated:

> A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions. A defendant's interest in presenting such evidence may thus " 'bow to accommodate other legitimate interests in the criminal trial process.' " As a result, state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not "arbitrary" or "disproportionate to the purposes they are designed to serve." *Moreover, we have found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused.*

Id. at 308.

It is not the Supreme Court of New Jersey that fails in its application, but rather Petitioner who fails to recognize that the Court did apply the analysis. The New Jersey Supreme Court acknowledged that constitutional rights "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." Pet., App. at 20a. However, the Court went on to state that, "when the mechanistic application of a state's rules of evidence or procedure would undermine the truth-finding function by excluding relevant evidence necessary to a defendant's ability to defend against the charged offenses, the Confrontation and Compulsory Process Clauses must prevail." *Ibid.* The Court properly found that exclusion of the evidence infringed upon the weighty constitutional interests of the accused to confront witnesses against him, to compulsory process, to present a defense, to a fair trial, and so on. It cannot be more clear than the Court's finding that the exclusion of the evidence compromised defendant's ability to defend against the charges. Pet., App. at 20a.

In fact, when viewed in context, *United States v. Scheffer*, *supra*, actually supports the ruling of the New Jersey Supreme Court. In *Scheffer*, This Court addressed the question of whether Military Rule of Evidence, 707, which categorically precluded polygraph evidence in court-martial proceedings, unconstitutionally abridged the right of the accused members of the military to present a defense. This Court held that the categorical preclusion of the evidence was constitutional, because the evidence was unreliable, because the exclusion of the evidence preserved the fact-finder's core function of making credibility determinations, and because the exclusion of the evidence avoided litigation over issues other than guilt or innocence.

In *Scheffer*, in holding that the exclusion of the polygraph evidence was constitutionally permissible, this Court rejected the applicability of *Rock v. Arkansas*, *Washington v. Texas*, and *Chambers v. Mississippi*. In *Rock v. Arkansas*, 483 U.S. 44, 52, 62, 107 S. Ct. 2704, 2709, 2714, 97 L. Ed. 2d 37, 46,

52 – 53 (1987), this Court held that the exclusion of hypnotically-refreshed testimony that was material and favorable to the accused, tending to show that the gun accidentally discharged, violated defendant's right to compulsory process. In *Washington v. Texas*, 388 U.S. 14, 16, 23, 87 S. Ct. 1920, 1921 – 22, 1925, 18 L. Ed. 2d 1019, 1021, 1025 (1967), the Court held that the defendant's right to compulsory process was violated by excluding the co-defendant's testimony with respect to the circumstances of the shooting, when such testimony was "vital" to the defense's theory as to who fired the fatal shot. In *Chambers v. Mississippi*, 410 U.S. at 294 – 303, 93 S. Ct. at 1045 – 49, 35 L. Ed. 2d at 308 – 313, the Court held that the defendant's rights to confrontation and compulsory process were violated by the preclusion of cross-examination and the exclusion of direct testimony regarding a third-party's oral and written confessions to the charged-murder, finding that such evidence was "critical" to the defendant's defense of third-party guilt.

As stated, when viewed in context, *Scheffer* appears to support the ruling of the New Jersey Supreme Court. Unlike the evidence in *Scheffer*, the proffered evidence regarding J.S.'s prior sexual conduct was reliable, its admission would have preserved the core fact-finders core function of making credibility determinations, and its admission directly impacted on the issue of guilt or innocence. Under *Scheffer's* reasoning, the evidence in the case at bar would have been admissible.

Additionally, the cases discussed and rejected in *Scheffer* – namely, *Rock v. Arkansas*, *Washington v. Texas*, and *Chambers v. Mississippi* – are squarely on point here. As in those cases, the New Jersey Supreme Court found that the admission of the proffered evidence was "critical to the ultimate determination of the jury," "was necessary for defendant to receive a fair trial," "was relevant and necessary for a fair determination of the witnesses' relative credibility and on the ultimate issue of consent." Pet., App. at 25a, 27a, 30a. The New Jersey Supreme Court concluded that the "exclusion of the

evidence was 'clearly capable of producing an unjust result.' " Therefore, there can be no question that the New Jersey Supreme Court found the exclusion of the evidence to have infringed upon a weighty interest of the accused.

Similarly, the New Jersey Supreme Court expressly relied upon *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). In *Davis*, the State's key witness was a juvenile, who was serving a probationary term for a juvenile adjudication at the time he cooperated with the State and provided information that defendant was involved in a burglary. When the juvenile took the stand, the defense sought to cross-examine him regarding his bias, contending that due to his probationary status the juvenile had an incentive to curry favor with the State. The trial court precluded the cross-examination on the basis of the provisions protecting the juvenile's interests in the confidentiality of his juvenile adjudication. This Court reversed the conviction and held that "[t]he State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness." *Id.* at 320, 94 S. Ct. at 1112, 39 L. Ed. 2d at 356.

Again, the New Jersey Supreme Court's decision is in complete accord with *Davis v. Alaska*. *See also Olden v. Kentucky*, 488 U.S. 227, 229 – 33, 109 S. Ct. 480, 482 – 84, 102 L. Ed. 2d 513, 518 – 20 (1988) (holding that the right to confront witnesses was violated by precluding cross-examination regarding the rape victim's cohabitation with defendant's half-brother, as such evidence was "crucial" to consent defense); *Crane v. Kentucky*, 476 U.S. at 690, 106 S. Ct. at 2146, 90 L. Ed. 2d at 645 (holding that the admission of testimony "central" to the defense regarding the reliability of the juvenile's murder confession was necessary for a fair trial).

Petitioner's misplaced reliance upon the *Scheffer* case reveals the fundamental flaw in the entirety of Petitioner's arguments. Petitioner draws attenuated analogies to issues

unrelated to the issue addressed by the Supreme Court of New Jersey and then draws sweeping conclusions based upon the analogies. For example, Petitioner attempts to analogize Respondent's right to present crucial evidence, evidence necessary for a fair determination of the ultimate issue of consent, to the admission of a conviction more than ten years old for impeachment purposes. *See* Pet. at 23 – 24. Clearly, the comparison is flawed. There is a tremendous difference between evidence truly essential to the ultimate issue in the case, namely consent, and rote and remote impeachment evidence.

Moreover, Petitioner refers to, and discusses at length, articles and studies on rape and reporting rates in the United States, when no one disputes the seriousness of the crime and when no one disputes that rape victim's have a legitimate interest in Rape Shield Laws. At certain points, Petitioner's submission constitutes nothing more than victim's rights propaganda. At others, Petitioner fails to recognize that there must be a balance between the interests of victims and the fundamental, constitutionally guaranteed rights of defendants. When tension arises that threatens to undermine the fairness of the criminal trial process and call into question the resulting verdict, then defendant's constitutional right to confront witnesses, to compulsory process, to a fair trial and so on should prevail.

III. THE NEW JERSEY SUPREME COURT'S DECISION DOES NOT HAVE ANY FAR-REACHING IMPLICATIONS.

In its petition, Petitioner argues that the New Jersey Supreme Court's ruling "is emblematic of a national phenomenon demanding the global action only this Court can take. Time and time again, we have seen a weakening of state rape shield laws. . . ." Pet. at 7. Further, Petitioner argues that the ruling will "cast doubt on the evidence rules of the federal government and a number of states." Pet. at 24 – 25. Without doubt, Petitioner greatly overstates the significance of the New Jersey Supreme Court's ruling.

A. THE NEW JERSEY SUPREME COURT DID NOT STRIKE DOWN THE RAPE SHIELD LAW.

The New Jersey Supreme Court did not strike down the New Jersey Rape Shield Statute. Rather, in reality, the New Jersey Supreme Court simply reaffirmed the *Budis* two-step analysis to determining when to admit evidence pertaining to a victim's past sexual conduct, an analysis employed by the New Jersey Courts for years. *See* Cannel, *New Jersey Crimes Code Annotated*, comment 4 on N.J. Stat. Ann. 2C:14 – 7d (stating that the "1994 changes in the statute can have no effect on that rule since it is required to preserve the statute from constitutional attack"). As such, contrary to the assertions in the petition, nothing has changed. The effect of the Court's ruling in New Jersey will be minimal. The effect of the Court's ruling elsewhere will be non-existent.

The New Jersey Supreme Court rightly recognized the important, diametrically opposed competing interests and struck a balance that served such interests:

> At stake in our evaluation of N.J. Stat. Ann. 2C:14 – 7 are competing rights: the right of a person accused of a crime to confront his accuser and to present evidence in support of his defense, and the right of a victim to maintain her privacy from unwarranted intrusions into her past. In balancing these competing claims, we must look to the nature and quality of the evidence offered and the need for that evidence to assure a fair determination of the issues.
>
> . . .
>
> On the one hand, the Shield Statute is intended to encourage the reporting of sexual abuse by assuring victims that they will not be subject to untoward invasions of privacy through excessive and collateral cross-examination of their prior sexual conduct. That objective also recognizes that jury verdicts

> should not be based on prejudicial excursions into the non-probative private affairs of a victim. On the other hand, the Statute preserves the core values that are protected by the Federal and State Confrontation Clauses – the right of the accused to present all relevant evidence necessary for the defense and the right to a fair trial. The privacy interest of the victim must be measured against preserving the integrity of the fact-finding process, the objective of which is to achieve a just verdict.

Pet., App. at 16a. The reformulation of the statute correctly balanced those interests.

B. THE NEW JERSEY SUPREME COURT DECISION DOES NOT CONFLICT WITH ANY OTHER STATE OR FEDERAL DECISION.

As stated, Petitioner has asserted that the New Jersey Supreme Court's ruling will have far-reaching ramifications in state and federal jurisprudence. However, Petitioner fails to cite any reported decision that conflicts with the ruling. Petitioner further fails to note that New Jersey still maintains one of the strongest Rape Shield Laws in the country. Pet., App. at 36a – 37a. Accordingly, it appears that the ruling's has little potential for casting doubt on the evidence rules of the states or the federal government.

C. THE NEW JERSEY SUPREME COURT'S DECISION CANNOT BE CHARACTERIZED AS FAR-REACHING EVEN IN THE STATE OF NEW JERSEY.

As the New Jersey Supreme Court noted, its ruling cannot be characterized as far-reaching even in the State of New Jersey.

> *The case before us is limited to its unique facts.* We do not suggest that in other contexts personal interactions such as a compliment, a hug, or even an

> occasional off-color comment or joke, should be viewed as anything other than ordinary socializing. The circumstances of each case will determine whether the conduct has bearing on the issue of consent.

Pet., App. at 28a [emphasis added].

In sum, the New Jersey Supreme Court's ruling is a narrow ruling, in which the state court of last resort ruled upon the application of a state statute. Further, the Court basically reaffirmed the existing rule of law under *State v. Budis*, *supra.* and reformulated the statute in accordance with the state and federal constitutional principles cited therein. Accordingly, the petition for a writ of certiorari should be denied.

CONCLUSION

Based upon the foregoing arguments, Respondent Anderson Garron respectfully requests that this Honorable Court deny the petition for a writ of certiorari.

Respectfully submitted,

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